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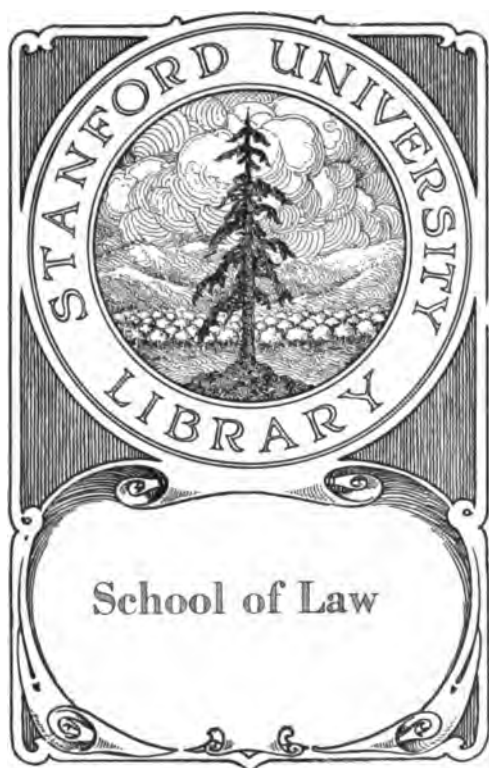
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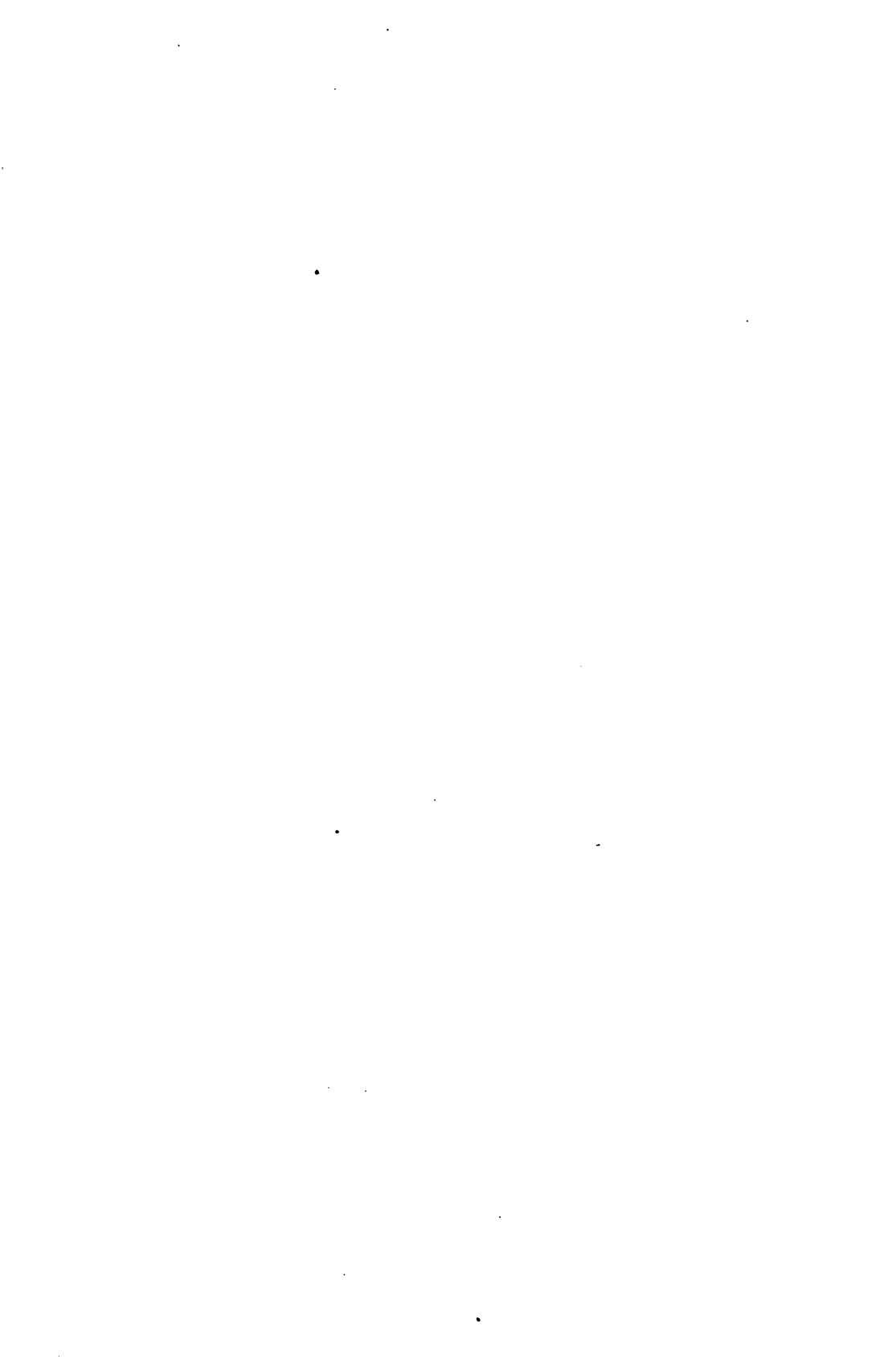
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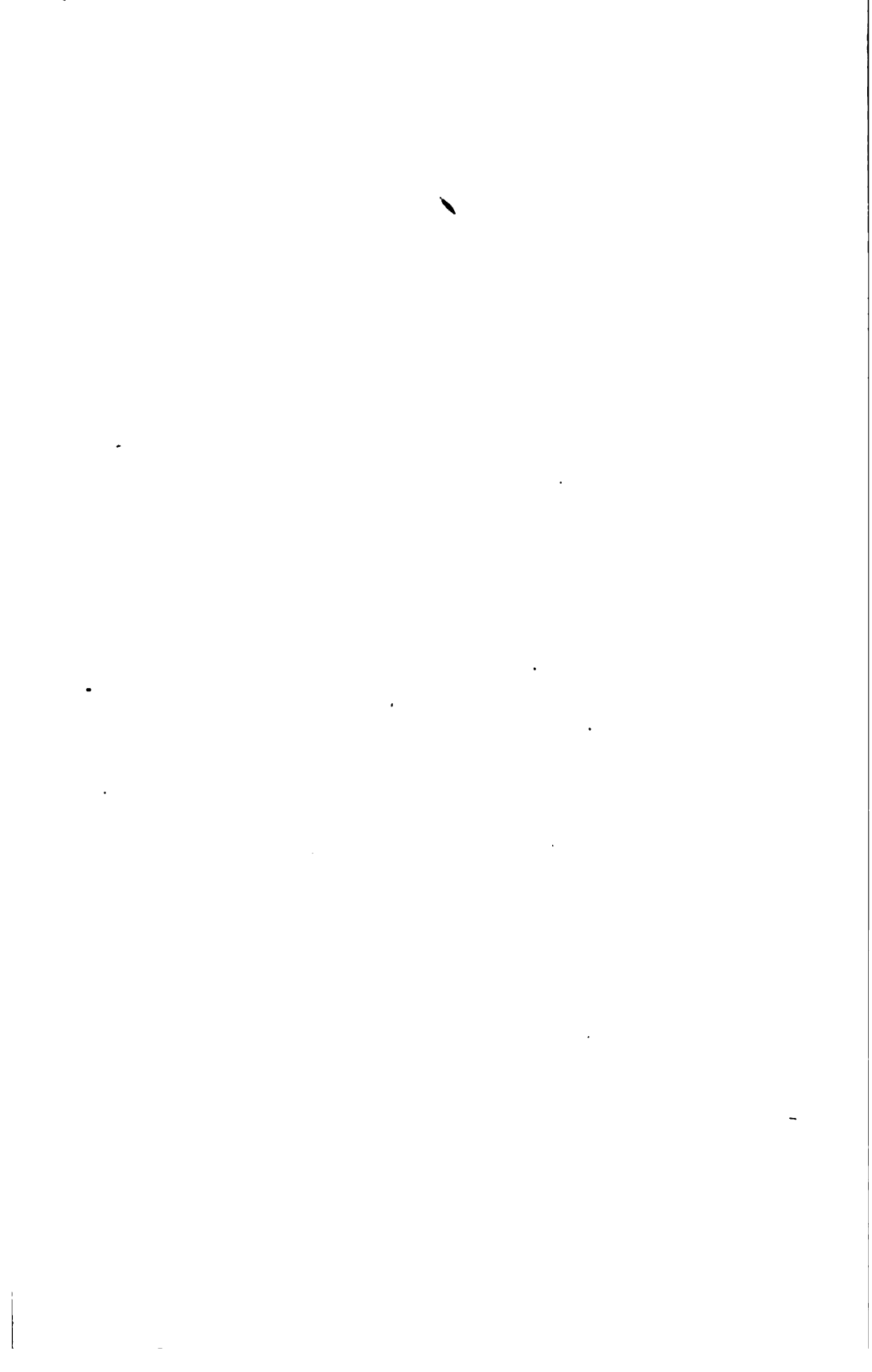
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DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR JANUARY:

1. Sat....Circumcision. New Year's Day.
2. SUN...2nd Sunday after Epiphany.
3. Mon...County Court term begins. Heir and De-
visee sittings begin. Municipal elections.
6. Thu...Epiphany. Christmas vacation in Chancery
and vacation for Judges Q.B. and C.P. sit-
ting singly end.
5. Sat....County Court term ends
9. SUN...1st Sunday after Epiphany.
10. Mon...Toronto Nisi Prius sittings—Harrison, C.J.
11. Tues...Toronto Oyer and Terminer—Gwynne, J.
12. Wed...Sir Charles Bagott Governor-General, 1842.
16. SUN...2nd Sunday after Epiphany.
17. Mon...First meeting of Municipal Councils (except
Co. Council). Hamilton Assizes—Moss, J.
18. Tues...Heir and Devisee sittings end.
22. Sat...Candidates for Attorneys to leave papers
with Sec. of Law Society.
23. SUN...3rd Sunday after Epiphany.
25. Tues...Exam. of Students and Articled Clerks. Co.
Councils hold first meeting.
30. SUN...4th Sunday after Epiphany.
31. Mon...Earl of Elgin, Governor-General, 1847.

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THE
Canada Law Journal.

Toronto, January, 1876.

THE following is the result of the Scho-
larship examinations at Osgoode Hall, for
Michaelmas Term, 1875:—

4th year.	(Maximum 400.)	Marks.
D. E. Thomson (Scholarship).....	324	
3rd year.	(Maximum 320.)	
James Fullerton (Scholarship).....	274	
2nd year.	(Maximum 320.)	
1. T. P. Galt (Scholarship).....	258	
2. T. Ridout (honourable mention).....	253	
3. R. W. Keefer " "	247	
4. J. V. Teetzel " "	237	
1st year.	(Maximum 320.)	
1. H. P. Sheppard (Scholarship).....	297	
2. Hugh Blair (honourable mention).....	236	
3. W. E. Higgins " "	246	

THE *Law Times* tells of a case in the Clerkenwell Police Court, which illus-
trates the vitality of ancient customs
handed down by tradition among the
lower classes. A person had died owing
his landlord a few pounds, and the latter
refused permission to the relatives to
remove the corpse till the debt was
paid. It was once the custom in Eng-
land to defer the burial of a person dying
in debt. But the law is abundantly
clear, that so far from being able to detain
the body, the person in whose house a
poor man dies is bound to give the
remains a decent burial. The cases cited
are *Reg. v. Stewart*, 12 A. & E., 779;
Reg. v. Fox, 2 Q. B., 246; and *Jones v.
Ashburnham*, 4 East 460.

HOWEVER desirable, from the wife's
point of view, the privilege of suing and
being sued independently of her husband
may be, cases may arise which will cause
the husband to look upon it as anything
but a privilege. Indeed, in a recent ar-
gument in the Court of Chancery, such a

EDITORIAL ITEMS.

case was referred to with much feeling by a learned Queen's Counsel, as having actually transpired in one of our counties. It appears that a married woman applied to a shopkeeper for goods, informing him however, that she was acting contrary to her husband's instructions. The merchant, nevertheless furnished the goods, and charged the woman personally with their price. He then shortly after sued her alone in the Division Court. The result was that the woman was kept a whole day in attendance at Court, and the equally unfortunate husband was kept at home to take care of the children. To assist him in his onerous duties he had to subsidise a neighbour of the gentler sex at an outlay which he begrudged. He now complains that the Legislature entirely neglects the interests of the unprotected male. The case had its parallel in another—in Wyoming county—cited by the same counsel, where the husband spent the day in walking about outside the court house with the baby in his arms, while the wife performed her duty to the State on the jury.

PROBABLY no stronger illustration could be given of the fact that law does not profess to be co-extensive with morality, than the state of the law relating to drunkenness. It is said by Galt, J., in *Reg. v. Blukely*, 6 Prac. R. 244, that there are certain vices which, in the eye of the law, are punishable only when practised publicly, and that drunkenness is one of these. A man cannot, when drunk in his own house, be forcibly removed therefrom, even at the request of his own family, unless his conduct be such as would constitute him a nuisance to the public, that is, by creating a public disturbance. A case of similar import recently came before the Belfast Police Court. Ann Ryan, a licensed publican, was summoned for being drunk on her

own premises. It was sought to subject her to a penalty under the 12th section of the recent Licensing Act, which inflicts a penalty upon "every person" "found" drunk in any licensed premises. The magistrate, however, held that the Act was not intended to deprive licensed publicans of the privilege of getting drunk in their own public house, but only reached the casual visitor or customer.

THE *Solicitors' Journal* notes the cases on the question as to the right of the prosecuting counsel in a Crown prosecution to reply when no evidence is called on behalf of the prisoner. When the Attorney-General appears officially on behalf of the Crown he is entitled to reply: *Reg. v. Marsden*, M. & M., 439. A similar right has been conceded to the Solicitor-General: *Reg. v. Tonkley*, 10 Cox C. C., 406, and *Reg. v. Barron*, 10 Cox C. C., 407. By the rules made by the judges in 1837, regulating the practice in trials for felony (7 C. & P., 676), it is taken for granted that the counsel who represent the law officers of the Crown are also entitled to reply in such cases: see *Reg. v. Gardner*, 1 C. & K., 628. But in *Reg. v. Christie*, 1 F. & F., 75, the Court refused to extend the privilege to the Attorney General for the County Palatine of Lancaster,—Martin, B., there remarking that the practice was a bad one. In *Reg. v. Beckwith*, 7 Cox C. C., 505, Byles, J., refused the alleged right to the counsel prosecuting in a matter originating with the Poor Law Board. The claim of the Crown counsel to reply in a prosecution conducted by the Solicitor of the Treasury was, after discussion, recently allowed by Mr. Justice Field. The *Solicitors' Journal* regrets that any exception should have been established in prosecutions on behalf of the Crown, and deprecates any extension of the anomaly: 19 Sol. J., 893.

EFFECT OF THE ADMINISTRATION OF JUSTICE ACT.—WANTS AT OSGOODE HALL.

*EFFECT OF ADMINISTRATION
OF JUSTICE ACT.*

WHEN speaking recently of the effect of the Administration of Justice Act we alluded, among other results, to an apparent falling off in Chancery business. That was the general belief in the profession, but there seems to be some doubt as to the correctness of that opinion—an opinion which could not then be verified. Complete statistics are not as yet procurable, but, so far as we have been able to ascertain, they show that a much larger number of bills were filed in the year that has just closed than in any previous year; and that more bills were filed in 1875 than in 1869. The impression may partly have arisen from the Tuesday's work in Chancery having almost disappeared, owing mainly to the fact that in ejectment suits at Common Law equitable defences may now be set up, and that injunctions to restrain suits at law are now things of the past. We shall endeavour at an early day to lay before our readers as full information on this subject as we can obtain.

It is difficult of course at present to judge fully of the probable effect of the Administration of Justice Act in its bearing on the relative amount of business done in the various Courts, especially as the judges of the Common Law Courts are for the first time working under a system which is new to them, though it has been in successful operation in the Court of Chancery for some fifteen years. Speaking of this reminds us of the act introduced by Mr. Hodgins, which is reprinted on another page, which would provide for business being sent from one Court to another so as to equalize the work. There could be no objection to this as between the two Common Law Courts, but it seems too soon to be able to judge of its propriety as between a Common Law Court and the Court of Chancery. Whilst the Act alluded to contains much that we

approve of, there is in the mind of the Bench and Bar an abhorrence of those never ending changes that drives the practitioner to despair, and prevents a fair trial of that which may or may not have been wisely conceived, or may or may not have been carefully enacted.

WANTS AT OSGOODE HALL.

THIS is an age of Club. The Law Society is in the nature of a club; but, though not a club established for "social purposes," its members are bound together by well understood ties and associations. We do not propose that it should change its mission, but it is quite evident that it might have those few advantages of a social club which are not inconsistent with its main objects. For instance, why should not the initiated of Osgoode Hall have some place provided for washing their hands? How can those who frequent the western wing be expected to appear there at all hours, in conformity with one of the best known maxims of equity, without some provision of this nature? The out offices, moreover, are scarcely equal to those of the lowest tavern between here and Lake Shebandowan. Again, when "grub" is scarce we flatter ourselves we can go on short allowance as well as most men, and make up for it with the accommodating stomach of a "noble savage" when opportunity offers; but we are satisfied that it would be a great accommodation to those whose duties compel them to remain at Osgoode Hall from early in the day until late in the afternoon, if there were some place in the building where they could obtain a plain luncheon. We understand that some of the Judges have set their faces against anything of this kind, for the same reasons that led to the attempts to close the saloons of the Parliament Build-

DEFECTIVE LEGISLATION.

ings. Though not very complimentary to the profession, there is probably some force in the objection; but there could be no objection whatever if the liquids were "something soft" instead of "hard." (We use these words advisedly, as they are now familiar to ears judicial, and, in fact, have acquired a technical meaning by reason of the evidence in the *South Ontario Election* petition and other kindred cases). There is, in truth, no necessity for more than such mild refreshments as have made "Coleman's" a popular resort to those adventurous spirits who, in their desire for a cup of coffee, sometimes find their cases struck out on their return to court. These things could be rectified at once; but when the scheme of taking the Court House to the north side of Osgoode Hall is carried out, we may expect to see other improvements, in the way of extra rooms for consultations and arbitrations, also a room for the reporters, and for witnesses when excluded from court or when waiting for the case in which they are to testify. Possibly there may, even now, be some spare rooms that could be used for these purposes.

DEFECTIVE LEGISLATION.

"If the framers of Acts of Parliament," said the Lord Chief Justice of Ireland in the course of a recent argument, "had an opportunity of listening to the arguments in Courts of Justice which they sometimes involved, it might have the effect of leading to some improvement in the phraseology of enactments, and in preserving their consistency; and they would then perhaps learn how much time and money are wasted in endeavouring to make out what these acts were really intended to mean."

The subject of the defects in forms of Acts of Parliament is as old as the earliest

Act of Parliament itself. In England it is found that the provisions for the revising of bills which are apparently analogous to those in this province, do not by any means insure accuracy and lucidity in the acts. The Statute Law Commissioners in England report in favour of the appointment of an officer or board, with a sufficient staff of assistants, whose duty it should be to advise on the legal effect of every bill which either House of Parliament should think proper to refer to them,—in a word, as the Irish *Solicitor's Journal* puts it, "a minister who shall really be responsible for the administration of the law and its amendment, with power to procure such learned assistance as will enable him to cope with the task of throwing the wishes of the Legislature into intelligible shape, and expressing them in intelligible language."

The expenses of governing this province are already such as to preclude the hope that any plan equal to the requirements of the case should be adopted. As long as Ontario enjoys the privilege of making local laws, so long must we expect these laws to be hard of interpretation. But errors such as those to which a correspondent, "E. W.," has called our attention, might surely, by the exercise of ordinary care, be avoided. 36 Vict. cap. 135, (Ont.) the Act respecting the Property of Religious Institutions, professes by sec. 18 to repeal 35 Vict. cap. 36, which is "An Act for the Prevention of Corrupt Practices at Municipal Elections." The act intended to be repealed is obviously 35 Vict. cap. 35. Our correspondent, if he had pursued his inquiries further, would have found another blunder in the same sec. 18. It purports to repeal 27, 28 Vict. cap. 43, "An Act to amend the Law in *qui tam* Actions in Lower Canada," instead of cap. 53. The general principle applicable to the construction of statutes is that the courts, in a clear case of clerical error or misprint, may read the statutes so as to

GARNISHMENT OF EQUITY DEBTS.

effectuate their obvious intention : (see the observations of Richards, C.J., in *Brown v. Dwyer*, 35 U. C. Q. B., at p. 364); and we presume that these mistakes are within the rules there spoken of.

GARNISHMENT OF EQUITABLE DEBTS.

It has been clearly laid down in many cases under the garnishment clauses of the Common Law Procedure Act, that only legal debts—debts for the recovery of which an action at law could be maintained—could be attached. Thus in *McDowall v. Hollister*, 25 L.T.N.S. 185, it was held that a creditor cannot attach a legacy given by a testator to the judgment debtor while in the hands of the executor, unless there has been such an account stated with the executor as would enable the legatee to maintain an action at law; and that the consent of the executor to pay, if the Court should so order, did not avail to warrant the attachment.

An attempt to give equitable extension to the doctrine of garnishment, which signally failed for the foregoing reason, is to be found in the series of cases, *Gilbert v. Jarvis*, 16 Gr. 265; *Blake v. Jarvis*, ib. 295; *Blake v. Jarvis*, 17 Gr. 201, and *Gilbert v. Jarvis*, 20 Gr. 478, wherein the Court of Appeal in this Province overruled the previous decision (favourable to such extension) of the *Bank of British North America v. Matthews*, 8 Gr. 492.

One of the cases which went as far as the law permitted before the new departure to which we shall presently advert, was that of *The Warwick and Worcester Railway Company, Prichard's claim*, 2 De G. F. & J. 354, wherein the Court permitted the proceeds of a call made under the Winding-up Acts to provide

for the payment of a debt of the company, to be attached in the hands of the official manager, to answer a judgment recovered against one of the creditors of such company. But Turner, L.J., is careful to explain that this does not amount to the attachment of an equitable debt: "the attachment," he observes, "is against the company, upon a debt due from the company to their creditor, and the official manager had the money in his hands wherewith to pay the debt independently of any question as to how the fund arose."

The effect of the English Judicature Act seems to have altered the law of garnishment, so as to embrace cases of equitable debts. In *Wilson v. Dundas*, 20 Sol. J. 99, an application was made by Wilson, the judgment creditor, to attach half a year's salary due to Mackenzie, the judgment debtor, from his trustees, Dundas and Stevenson. It was contended for the garnishees that this was a trust debt, and therefore not attachable. Mr. Justice Quain (sitting in Chambers, Nov. 29), in giving judgment, is reported to have said: "Ord. 3, r. 6, expressly says that there may be a special endorsement of a trust debt. If Mackenzie brings an action against his trustee, he can recover his half-year's salary. It is submitted for the garnishees that there cannot be an attachment of an equitable debt; but there is no distinction now between a legal and an equitable debt. I should be contravening the very object of the Judicature Acts, if I were to hold otherwise. If, sitting here, we could not now attach an equitable debt, we might as well be under the *ancien régime*." As, however, the garnishees disputed their liability, he ordered a special case for determining the question.

If the view of the learned judge is well founded, his line of argument is quite applicable to the provisions of the Ontario Administration of Justice Act of 1873.

THE ENGLISH JUDICATURE ACTS.

The second section of that act gives the right to sue at law in case of a pure money demand, although the plaintiff's right to recover may be an equitable one only. We have already called attention to the desirability of amending the law in this direction; the judges have on more than one occasion called attention to the imperfection of the law under the Common Law Procedure Act; and we trust it may be found that one result of the Act of 1873 is to remedy this defect, so as to enable the court to realise equitable debts by process of garnishment for the benefit of execution creditors.

THE ENGLISH JUDICATURE ACTS.*

More than twenty-five years ago, the great revolution in the administration of justice in England, which has culminated in the Supreme Court of Judicature Acts, received its first impulse. The commission appointed in the year 1850 to inquire into the constitution of the Common Law Courts, reported that it appeared to them that the Courts of Common Law, to be able satisfactorily to administer justice, ought to possess, in all matters within their jurisdiction, the power to give all the redress necessary to protect and vindicate Common Law rights, and to prevent wrongs, whether existing or likely to happen unless prevented. They also urged that a consolidation of all the

elements of a complete remedy in the same Court was obviously desirable, not to say imperatively necessary, to the establishment of a consistent and rational system of procedure.

The commissioners appointed in 1851 to inquire into the constitution of the Court of Chancery made suggestions of a similar character. They dwelt upon the necessity of a transfer or blending of jurisdiction, so as to render each Court competent to administer complete justice in cases falling under its cognizance. The labours of these commissions, as is well known, effected vast improvements in procedure, but their recommendations touching the blending or consolidation of the distinct jurisdictions remained to gain the approbation of a later day.

In the year 1867 a royal commission was again nominated, to inquire generally into the constitution of the Superior Courts. In their instructions the subject of a union or consolidation of courts, or an extension of jurisdiction where one court did not possess as full powers as another, had a prominent place. That commission, after forcibly pointing out the evils of the distinct and, in many cases, conflicting jurisdictions, reported that in their opinion the first step towards meeting and surmounting these evils would be the consolidation of the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty into one court, in which all the jurisdictions of the several courts so consolidated should be vested.

In 1870 Lord Hatherly introduced a bill into the House of Lords to give effect to these suggestions. This bill was withdrawn. In 1873 Lord Selborne, who had succeeded to the Chancellorship, framed and introduced a bill which, with but little alteration became law as the Supreme Court of Judicature Act, 1873. In 1874 Lord Cairns introduced an amending Act, postponing the opera-

* The Supreme Court of Judicature Acts, 1873 and 1875, with notes, by Arthur Wilson, of the Inner Temple, Barrister-at-Law. London: Stevens & Sons. Toronto: R. Carswell.

The Supreme Court of Judicature Acts, 1873 and 1875. Edited by William Downes Griffith, of the Inner Temple, Barrister-at-Law, late Her Majesty's Attorney-General for the Cape of Good Hope. London: Stephens & Haynes. Toronto: R. Carswell.

THE ENGLISH JUDICATURE ACTS.

tion of the original Act till November 1875; the remainder relating chiefly to the formation of a Court of Appeal. These two statutes are known as the Supreme Court of Judicature Acts, 1873 and 1875.

In the schedule to the Act of 1873, the outlines of a system of procedure were laid down. These were to be binding until altered by the body of the judges after the Act came into operation. This Act also empowered the Queen in Council, on the advice of the judges, to issue rules to complete the system of procedure. Rules were accordingly framed and approved by the judges, and issued in the summer of 1874. These rules have been pronounced by one of our own judges, well fitted to form an opinion, to be models of drafting. In the schedule to the Act of 1875 all the rules—both those comprised in the schedule to the first Act and those framed by the judges—are inserted in a consolidated form, while power is still reserved for the creation, by the judges, of additional rules.

Such is a brief history of the legislation which has made so sweeping a change in the administration of law in England. Let us now glance at the main provisions of that legislation.

The High Court of Chancery of England, the Courts of Queen's Bench and Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes are, by these Acts, united and consolidated together, and now form one Court, the Supreme Court of Judicature in England. The Supreme Court, however, as such, will exercise no jurisdiction. It is divided into the High Court of Justice and the Court of Appeal.

To the High Court of Justice now belongs the whole of the original juris-

diction of the Courts we have just enumerated.

This Court is subdivided into five divisions, perpetuating, in accordance with the advice of the Commissioners, the names of the Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, and Probate, Divorce, and Admiralty, the last named courts forming one division. Any judge may sit in a court belonging to any division, or for any other judge.

The great evil attacked by the Judicature Acts was the possibility that a suitor in one Court might fail of obtaining the relief to which the law recognised his right, although in another Court, had he applied there, he would have procured that relief. To obviate this contingency there are several express provisions. Each branch of the High Court is empowered, nay is required, to give any appropriate relief or remedy which could heretofore have been given by any Court to all or any of the parties to the action.

There are rights which equity recognises and enforces and of which the Common Law takes no notice, rights, for instance, arising out of estates which are recognised in equity but entirely ignored at law. Under the new system, subject to the power of transfer, equitable grounds of claim are to be fully recognised in each division and fully enforced. At the same time, each division is to give due effect to legal rights. Furthermore, as to cases where there has been an actual conflict of doctrines between courts, the Judicature Acts enumerate a number of the points on which such a conflict has existed, and declare what the law shall be for the future. Equitable doctrine is to prevail in cases not specially provided for.

But it must not be supposed that a plaintiff is at liberty to prosecute his action to its close, irrespective of its nature, in any division of the court. The acts assign to each division certain causes of action analogous to those over which,

THE ENGLISH JUDICATURE ACTS.

before the acts, the several courts corresponding to the several divisions had exclusive cognizance. There are at the same time provisions for the transfer of actions, when expedient; from one division to another, when actions have been commenced in the wrong division. In such cases the plaintiff will be allowed the full benefit of his proceedings up to the transfer.

Questions have already arisen under the sections referring to the transfer of actions. For instance, where a suitor commenced an action in the Chancery division for salvage, the Master of the Rolls lost no time in sending all the parties to the Probate, Divorce and Admiralty division.

Great changes have been made in the system of pleading, changes aiming at the reduction of expense, more especially in preliminary proceedings. A simple writ of summons will in future commence the action in every division. Even the special form of writ in ejectment has been done away with. But the writ is to be "endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action." An exact and detailed statement of the claim is not required, the rules providing that "it shall not be necessary to set forth the precise grounds of complaint or the precise remedy or relief sought." Out of a large number of forms prescribed by the rules we extract a few at hap-hazard. It will be seen that the initiation of a suit in Chancery, or in the Chancery Division, as will be said in future, is a less elaborate piece of business than it still remains with us.

The plaintiff's claim is to have an account taken as to what, if anything, is due on a mortgage dated , and made between (*parties*), and to redeem the property comprised therein.

The plaintiff's claim is to have a deed dated , and made between (*parties*), set aside or rectified.

The plaintiff's claim is for specific perform-

ance of an agreement dated , for the sale by the plaintiff to the defendant of certain freehold hereditaments at

The plaintiff's claim is for the warehousing of goods.

The plaintiff's claim is for damages for assault.

There are also provisions for special endorsements in certain cases, analogous to the enactments of the Common Law Procedure Act.

The rules in reference to the commencement of actions are aimed at the saving of expense in the large number of cases which never get beyond the initial stage, the commencement of proceedings bringing the defendant to terms. But, where the defendant appears, it is enacted that unless with his appearance he states that he does not require the delivery of a statement of complaint, the plaintiff shall deliver one, in reply to which defendant shall deliver a statement of defence, set-off, or counter claim. Such statements, it is directed, shall be as brief as the nature of the case will admit, and the Court, in adjusting costs, may inquire into any unnecessary prolixity and inflict payment of costs as a penalty therefor.

A new set of rules of pleading is substituted for all those in force at the coming into operation of the Acts. Every pleading is to contain, as concisely as may be, a statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, such statement being divided into paragraphs. Dates, sums and numbers are to be expressed in figures, and not in words. Forms of pleading to serve as models are appended to the Act of 1875. We venture to set out in full a form of statement of plaintiff's claim, equivalent to the declaration at Common Law or the Bill in Chancery, which will serve to show what a determined assault upon prolixity has been made:

THE ENGLISH JUDICATURE ACTS.

In the High Court of Justice.

Chancery Division.

(Name of Judge.)

Writ issued 22nd December, 1876.

In the matter of the estate of A. B., deceased,
between

E. F., Plaintiff,

AND

G. H., Defendant.

STATEMENT OF CLAIM.

1. A. B., of K., in the County of K., died on the 1st of July, 1875, intestate. The defendant, G. H., is the administrator of A. B.

2. A. B. died entitled to lands in the said county for an estate of fee simple, and also to some other real estate and to personal estate. The defendant has entered into possession of the real estate of A. B., and received the rents thereof. The legal estate in such real estate is outstanding in mortgages under mortgages created by the intestate.

3. A. B. was never married; he had one brother only, who predeceased him without being married; and two sisters only, both of whom also predeceased him, namely, M. N. and P. Q. The plaintiff is the only child of M. N., and the defendant is the only child of P. Q.

The plaintiff claims:

1. To have the real and personal estate of A. B. administered in this Court, and for that purpose to have all proper directions given and accounts taken.

2. To have a receiver appointed of the rents of his real estate.

3. Such further or other relief as the nature of the case may require.

We may add that no pleading beyond a replication seems to be contemplated.

Improvements have been made in the method of obtaining discovery, as well of facts as of documents, and fetters which formerly embarrassed a party in getting discovery have been removed.

There are a great number of other matters dealt with by these Acts, such as the trial of actions, references, evidence (evidence in the Chancery Division will be given orally at the trial, as in Common Law causes), judgment, motions for new trial, execution, appeals and costs, which we can merely indicate.

We may mention, however, specially, a provision recommended by the Commission and carried into effect. We mean

the enactment that in cases where the judge has reserved leave to move, there should no longer be a motion for a rule to show cause, but that upon notice given to the opposite party the question should be disposed of. In a late case of *Lindsey v. Cundy*, the Lord Chief Justice caused some surprise by asserting that it was difficult to say what the Legislature meant, and that nothing would be gained by this innovation.

The Court of Appeal consists of five ex-officio and three ordinary judges. The ex-officio judges are the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer. The first ordinary judges are to be the present Lords Justices and one other person, who has since been appointed, namely Mr. Justice Bagallay. Power is also given to the Lord Chancellor to call for the attendance of one judge from each division except the Chancery division as additional judges of the Court of Appeal.

This Court has jurisdiction to hear an appeal from any judgment or order, whether final or interlocutory, of the High Court, or any judges or judge of that court, except where it has been made by consent, or relates to costs only, when discretionary, and except judgments in criminal appeals, and in appeals from inferior courts, unless in the last mentioned cases leave to appeal is given.

By the Judicature Act of 1873, the decisions of the Court of Appeal were to be final, and all recourse to any higher court was taken away. The Act of 1875 has suspended for a year the operation of the sections affecting this, and for that time a further appeal to the House of Lords is preserved.

The Acts themselves, with the body of rules promulgated by the Judges (to whom was left the working out of the Acts in detail—a work equal in extent and import

AMENDMENTS TO ADMINISTRATION OF JUSTICE ACTS.

ance to the original legislation), form a mass of provisions with which we have not attempted to deal, except in the most cursory manner. We have selected what have appeared to us the salient features of the Acts. We have noted them almost without comment, believing that to Canadian lawyers they could not fail to be of interest, engaged as we are, in one province at least, in working out the same problem.

Already a score or more of works of various plans and of various degrees of merit, have appeared on the Judicature Acts in England. From the two named in connection with the title of this article we have drawn our information. Mr. Wilson's book is lucid in its arrangement, and contains under each section of the Act and rules all the necessary references to other sections relating to the same subject. In addition it contains a summary which will be useful to those who read to acquire a general knowledge of the Acts rather than for practical use. Mr. W. D. Griffith, the author of the other work referred to, held the office of Attorney-General at the Cape of Good Hope for some eight years, and has recently recommenced practice at the English Bar. He has had a large amount of leisure on his hands, which he has devoted assiduously to the annotation of the Judicature Acts. Add to this the experience no doubt gained in the tenure of an important office, and people will be ready to place a good deal of confidence in his book, as one likely to be accurate and to contain some valuable comments on the changes effected.

AMENDMENTS TO ADMINISTRATION OF JUSTICE ACT.

The following is the Bill introduced by Mr. Hodgins, to amend the Acts respecting the Administration of Justice :

1. Except in the Counties of York and West-
worth, and in the County Towns in which no
Chancery sittings are appointed to be held,
there shall be two sittings of the Court of As-
size and Nisi Prius, and General Gaol Delivery
and of Chancery, during each Spring and
Autumn Assize, one of which sittings shall be
for the trial of criminal cases and of civil cases
to be tried by a jury, and the other sitting for
the trial of Chancery cases, and civil cases to be
tried without a jury, and each of such sittings
shall be at least one month apart, and shall be
presided over and held by a Judge of the Court
of Appeal, Queen's Bench, Chancery or Com-
mon Pleas, as may be named for that purpose.

2. In the places excepted by the preceding
section, the non-jury cases shall be entered
upon a separate list from the jury cases and
shall be tried after all the jury cases are dis-
posed of, unless the Judge presiding at the
Assize otherwise order.

3. In case on the application of either of the
parties, or otherwise, it shall appear to the
Judge presiding at a sitting or Assize for the
trial of jury cases that any cause entered for a
jury trial at such sitting or Assize, should be
tried by the Judge without a jury, such Judge
may order such cause to stand over to be tried
with the non-jury cases, or he may appoint a
time after the jury cases, or otherwise, for the
trial of such cause.

4. All records for trial at Nisi Prius, to be
tried by a jury, and non-jury cases to be tried
under section two of this Act, shall be entered
with the proper officer not later than the last
day for giving notice of trial, according to the
present practice of the Superior Courts of Law.

5. All records for trial in non-jury cases to
be tried with Chancery cases shall be set down,
and notice of trial given not later than fourteen
days before the commencement of the sittings
at which they are to be tried.

6. In cases where no jury has been demanded
or no order has been made for the trial of the
issues or assessments of damages by a jury, at
least sixteen days before the commencement of
the sittings of an Assize for the trial of non-
jury cases, no jury shall be granted unless the
Court or Judge otherwise order on a special
application, and subject to such terms as to
costs or otherwise as may be just.

7. No countermand of notice of trial or hear-
ing in any civil cause or Chancery case shall be
valid unless given at least eight days before the
day of the commencement of the Assize or
sittings for which notice of trial or hearing has
been given.

AMENDMENTS TO ADMINISTRATION OF JUSTICE ACT.

8. In case it shall at any time appear to the Court or Judge that it will be conducive to the ends of justice that a suit or action depending on the Superior Courts of Law or Equity, or certain issues therein, should be tried and determined before a Judge sitting in open Court under section nineteen of the Administration of Justice Act, 1874, the said Court or Judge may direct such suit or action or issues where the venue is laid in the County of York or City of Toronto, to be set down or entered for trial, and notice of hearing or trial to be served upon all proper parties; and thereupon such suit or action, or the issues therein, shall be tried and witnesses examined before such Judge without a jury, and such Judge shall possess in respect of such trial all the powers, authority and jurisdiction of a Court of Assize and of a Judge presiding thereat; and such decree or judgment shall be pronounced or verdict entered as shall be just; and such further or other proceedings shall thereafter be taken thereon, as if such suit or action had been tried or heard at a Court of Assize or sittings of the Court of Chancery.

9. The Court of Chancery, during each rehearing term or at any sitting of the full Court, shall have and possess all the powers and jurisdiction of the Superior Courts of Common Law to hear and dispose of applications for rules for new trials in cases depending in the said Superior Courts of Common Law; and all such proceedings in relation thereto shall be entitled in the Court in which the action is depending, and in the said Court of Chancery, and the Judges and officers of such Court shall have the same powers and perform the same duties in relation thereto until rules as hereinafter provided are promulgated; and the practice and rules of the said Superior Courts of Common Law shall, as nearly as may be, apply to such applications as if the said Court of Chancery was the Court of Common Law in which such suit or action had been commenced: But the said Court of Chancery shall have power to make rules regulating the practice of such Court in respect of such applications.

10. It shall be lawful for the Chancellor, and the Chief Justices of each of the Superior Courts of Common Law, or in case of their absence or inability to act, then of the senior Vice-Chancellor, or senior Puisne Judge of each Superior Court of Law, or a majority of them, as the case may be, in case of pressure of business in Courts of Queen's Bench, Chancery or Common Pleas, and to transfer causes or motions for rules for new trials standing on the new trial list of any one of the said Courts, to another of

the said Courts, to be heard and disposed of by such Court; and such causes or motions or rules for new trials shall be heard and disposed of by the Court to which the transfer is made, and such Court, and the Judges and officers thereof, shall have the same powers and jurisdiction, and shall perform the same duties in respect of such causes or motions or rules for new trials, as the Court from which such transfer has been made.

11. No term of the Superior Courts of Law, shall end on the day fixed by law, nor until all the rules nisi for new trials granted during the first week of such term are disposed of by argument or otherwise, unless the Judges of the Superior Courts, or a majority of them, otherwise determine not later than the second Monday in such term.

12. Trinity Term shall commence on the last Monday in August, and the Courts of Queen's Bench and Common Pleas shall dispose of all business, whether enlarged from previous terms or not, which may be brought before them; but the said Courts may, by general rules, from time to time determine the business to be done in the said Courts during such term.

13. So much of section 17 of the Administration of Justice Act, 1874, as provides that there shall be no appeal to the Court of Error and Appeal from the judgment, decree, rule or order of a single Judge, until after a rehearing before the full Court is hereby repealed, and it shall not hereafter be necessary to rehear any cause or matter in law or equity, or any judgment, decree, rule or order of a single Judge, prior to an appeal to the Court of Error and Appeal, but nothing herein shall be construed to repeal section twenty of the said Act.

14. Where, in any suit or other proceeding, it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the Court or a Judge may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court may think fit, either specially or by public advertisement, and notwithstanding that the estate in question may have a substantial interest in the matters, or that there may be active duties to perform by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate where representation is sought; and the order so made, and

SHORT-HAND REPORTERS.

any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and had submitted his rights and interest to the protection of the Court.

15. The Law Society may from time to time appoint shorthand reporters to attend the several Courts to take notes of the evidence and report the judgments and proceedings thereat; and the Judges of the Superior Courts may from time to time, by general rules or orders, prescribe a tariff of fees to be paid by parties to suits, actions, matters or other proceedings in said Courts, towards forming a fund to provide for the allowances or salaries of such short-hand reporters, and may from time to time prescribe the duties of such short-hand reporters as officers of the said Courts.

16. ["Superior Courts" to include the Court of Error and Appeal.]

17. The Practice Court constituted under section nine of chapter 10 of the Consolidated Statutes of Upper Canada is hereby abolished, but the powers and jurisdiction of the said Practice Court may be exercised by a Judge sitting in open Court, under section nineteen of the Administration of Justice Act, 1874.

18. Section 88 of the Administration of Justice Act, 1874, is hereby amended so as to read as follows:—

(88.) Except where the County Council of any County has made contracts for the printing of official advertisements in any newspaper, and except where a judge's order, or the execution creditor having a writ against lands in the Sheriff's office, directs the said Sheriff as to advertising the lands for sale under the same, the Lieutenant-Governor in Council may direct through any department of the Government, that all Sheriff's advertisements and other legal and official advertisements shall be published in such newspapers as the said Lieutenant-Governor in Council may from time to time direct, but nothing in this clause shall apply to notices or advertisements required to appear in the *Ontario Gazette*, or to be published in public offices.

19. All inconsistent enactments are hereby repealed, and this Act shall be known and cited as the "Administration of Justice Act, 1876," and this Act and the Acts heretofore passed with a similar title shall be known and cited as the "Administration of Justice Acts."

SHORT-HAND REPORTERS.

DURING last term a special committee, consisting of Messrs. J. D. Armour, Thomas Hodgins and D'Alton McCarthy, was appointed by the Benchers of the Law Society to consider a system of short-hand reporting in connection with the Courts. On the 28th December last they reported to the Benchers of the Law Society, in convocation assembled, as follows:—

1. That in 1860 a system of short-hand reporting was adopted by the courts in the state of New York, under which stenographers were appointed to each of the courts at a per diem allowance, which subsequently was altered for an annual allowance on a very liberal scale.

2. That subsequently a similar system was adopted in the states of Illinois and Maine, and it has been found to work so satisfactorily that the system is now being introduced into the courts of other states in the American Union.

3. That in 1871 an Act was passed by the Legislature of Quebec (35 Vict., cap. 6, sec. 10) authorizing the appointment of short-hand reporters in the courts of that Province. The stenographer there is engaged by the prothonotary in any case desired by the litigants, and the costs of the short-hand reporter's notes of the evidence are paid in law stamps, and go into the public treasury, the short-hand reporter receiving his fees from the prothonotary according to the number of folios. Your committee are informed that as the merits of the system have become known, and as a great saving of time to the courts has been effected by it, stenography is now being used in nearly every case of importance in that province.

4. In the Dominion Controverted Elections Act of 1874, authority is given to the Judge presiding at any election trial to employ a short-hand writer to take down the oral evidence given by witnesses at the trial, and the expense of such short-hand writer is made costs in the cause. A similar practice, your committee believe, has been adopted in election trials in England.

5. In many of the election trials held during this year, affecting the elections to the Legislative Assembly, short-hand reporters have been employed, and the Courts have been enabled to get through the trial more rapidly than in the

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cases where the evidence has been taken in long-hand by the judge.

6. Your committee find that where the system of short-hand reporting in the courts has been adopted, the advantages of the system may be thus classified :—

(1.) It largely promotes the despatch of business, by lessening the time occupied in the trial of causes. The Judge is not called upon to take more than a mere summary of the evidence for the purposes of his charge to the jury, or his own finding, and he is enabled to give greater attention to the demeanour of the witnesses, and the substance of their evidence. The witness can tell his story or answer questions more promptly, and is not interrupted while important parts of his evidence are being written down in the Judge's notes ; and he is not, as in Chancery cases, compelled to wait and hear his evidence read over—sometimes questioned as to its accuracy—before being signed by him. The experience of learned judges and counsel in cases where short-hand reporters have been employed shows that fully one-third of the time usually devoted to the trial of a cause is saved by the employment of a short-hand reporter.

(2.) It ensures an accurate record of the evidence and proceedings at the trial. In many cases, owing to the rapidity of human utterance, and the inability to write down rapidly the evidence in long-hand, or because the learned Judge may not consider some facts material, an accurate record of the evidence is not preserved ; and counsel at the trial have no means of knowing what the Judge's notes of the evidence contain until moving in term, after the opportunity of rectifying imperfections has passed away.

(3.) It avoids disputes as to the statements of witnesses, and enables a witness to make a consecutive statement of what he knows, without the danger of losing the thread of his narrative by waiting for the Judge to write down *extenso* his statement of facts ; and it denies to an untruthful witness the time he would otherwise have to reflect upon the answers he should give while undergoing cross-examination.

(4.) It largely diminishes the burdens which are of necessity imposed upon suitors, witnesses, and jurors, by lessening the time they are compelled to attend court by fully one-third, thus saving witness' fees, and enabling the parties sooner to return to their ordinary avocations.

(5.) It also largely diminishes the expenses

of the courts and jury-fees by lessening the duration of the courts.

(6.) In criminal cases it puts the Appellate Court, or the Executive, in possession of a full and complete record of the proceedings and evidence at the trial of the parties in whose behalf new trials may be moved for, or the prerogative of clemency invoked.

7. Your committee believe, in view of the facts hereinbefore stated, that the proposed system of short-hand reporting will prove a measure of economy of time and money, as well as a means of expediting the administration of justice.

8. Your committee therefore suggest that the Government be requested to give effect to these recommendations by establishing a system of short-hand reporting in connection with the courts, and your committee recommend the following as the basis of the system :

(1.) That a staff of short-hand reporters be employed to attend with the Judges at each Court of Assize and Chancery sitting, to take full reports of the evidence and other proceedings at the trial—except the addresses or arguments of Counsel.

(2.) That of this staff two short-hand reporters be employed to attend at Osgoode Hall and the Toronto Assizes, to take notes of evidence at trials or *visa voce* judgments in term, and special examinations and such other business as may, from time to time, be assigned to them by the Judges.

(3.) That the short-hand reporters be appointed by the Law Society, and their duties regulated by a Committee of Benchers specially appointed for that purpose, and that they be subject to such general rules as may, from time to time, be promulgated by the Courts.

(4.) That the salaries of such short-hand reporters be fixed at fair and reasonable rates, and the reporters be allowed a fee of ten cents a folio where copies of the evidence are demanded by the parties to the suit, and to be paid for by said parties.

(5.) That short-hand reporting be made a department of legal education, and that prizes be offered by the Law Society for proficiency in stenography, with a view of training skilled legal reporters for the future carrying on of the system.

9. With reference to the ways and means of providing for the expenses of the proposed system, your committee have to make the following statements :

(1.) They find from the public accounts of the province of Ontario that there has been col-

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NORTH MIDDLESEX ELECTION PETITION.

[Ontario.]

lected in law stamps, and paid into the public treasury, the following sums during the years mentioned :

1870	-	-	-	-	\$78,477
1871	-	-	-	-	77,650
1872	-	-	-	-	87,165
1873	-	-	-	-	95,249
1874	-	-	-	-	75,164

These sums have been paid by the members of the legal profession, who have had to act in this matter as public tax-gatherers for the province.

(2.) A portion of these moneys—\$14,500 a year—has been appropriated towards liquidating the debt incurred by the Law Society, under Con. Statutes U. C. c. 35, to the Provincial Government for the erection of the Law Courts at Osgoode Hall; but by an agreement made between the Government and the Law Society in 1873, and approved by the Legislative Assembly on the 19th March, 1873, the Law Society was released of its covenant to furnish accommodation for the Superior Courts, and the building for which the debt was incurred, together with a large tract of land which was the exclusive property of the Law Society, were surrendered to the Crown. By this surrender the liability to pay the debt was cancelled, and the necessity for the collection of the fees to pay that debt then ceased. Under these circumstances, your committee find that the Government are yearly receiving large sums of money through the collections of the legal profession, on which your society may lay reasonable claim.

10. Your committee recommend, in view of these facts, that application should be made to the Government to appropriate out of the funds derived from law stamps a sum of about \$15,000 a year towards providing for and maintaining the proposed system of short-hand reporting—a sum which your committee consider will be sufficient at present for the purposes contemplated in this report.

We have already called attention to this subject, and last year (p. 127) shortly stated wherein some scheme of this sort would be beneficial. We are glad to see this report brought before the Benchers, as it puts the matter in a shape sufficiently tangible to invite an intelligent discussion. The estimated expense is less than we should have supposed would be necessary, and vastly less than the sum named by the Attorney General.

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ELECTION CASES.

NORTH MIDDLESEX ELECTION PETITION.

CAMERON V. McDOUGALL.

Treating—Meetings—36 Vict. cap. 2, sec. 2, 3.

After the nomination of the candidates in a rural constituency, and on another occasion after a meeting assembled "for the purpose of promoting the election of a candidate," the electors dispersed to various taverns, mostly to where their vehicles were put up, and then, according to the usual custom, treated each other before starting. The respondent himself partook of a treat.

Held, That this was not a contravention of 36 Vict. cap. 2, sec. 2, and that the respondent was not disqualified under sec. 3, ss. 2 of same Act.

Treating per se is not, except when made so by statute, a corrupt act, but the intent of the party treating may make it so, and this intent must be gathered from the circumstances attending it. Where, therefore, it was sought to disqualify a candidate who had treated during his canvass, though to a much less extent than was his habit previously, and who did not seem to have treated for the purpose of ingratiating himself with the public: *Held*, that such treating was not a corrupt act.

Held also, following the decision of the Chancellor in the *Dundas Case* (not reported), that the meeting of electors at the nomination of candidates is a meeting "for the purpose of promoting the election of a candidate," within the meaning of 36 Vict. cap. 2, sec. 2.

[September 28, 1875.—SPRAGGE, C.]

This petition was tried at London.

J. K. Kerr, for petitioner.

R. A. Harrison, Q. C., for respondent.

The facts sufficiently appear in the judgment of SPRAGGE, C.—One point taken by the petitioner was, that there were meetings of electors within the meaning of s. 61, of 32 Vict. c. 21, (Ont.) as altered by 36 Vict. cap. 2, sec. 2, at which there was treating within the meaning of that section; and that the same being with the actual knowledge and consent of the respondent, he thereby lost his seat and was disqualified.

Mr. Kerr's contention upon this point is that it is immaterial whether the treating was by the candidate himself, or by an agent, or by a stranger, and that the motive and intent are, under the section as amended, immaterial: that all that is necessary to bring the case within the section is, that the treating is to a meeting of electors, such as is described in this section, and that it is with the actual knowledge or consent (which Mr. Kerr reads, knowledge and consent) of the candidate: see 36 Vict. cap. 2, sec. 2, ss. 2.

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I incline to agree with this interpretation of the section, and in the *Dundas Case* I acted upon a like construction then put upon it by myself; with this difference, that in that case the treating was by an agent of the candidate, not by a stranger; but I thought in the *Smith Essex Case*, 11 C. L. J. 247, that a corrupt practice participated in by an agent, the agent being by his participation a party thereto, would avoid the election. This was under the second provision of section 66 of 32 Vict. cap. 21, (and this construction has now, I understand, been affirmed by the Court of Appeal); but my difficulty in this case is upon the question whether the treatings in question were to "meetings of the electors" within the meaning of the section. I take the meeting on nomination day and at Elson's as examples. I take the meeting held on that occasion (the nomination) to have been a meeting within the section.

The meeting at Elson's, while of a different character, was still in my opinion a meeting of electors assembled for the purpose of promoting the election; and if the treating had been in any proper reasonable sense a treating to electors so assembled, I should hold it to be a corrupt act. But there are these material circumstances to be taken into account. North Middlesex is a rural constituency; the electors attending these meetings were for the most part from a distance; their horses and conveyances would be put up in the stables and driving sheds of the taverns of the place. The meetings were in January, and the weather is described to have been very cold. Then there is the custom of the country, not to be commended but still to be taken into account, to take drink in the bar-rooms of taverns, and to do so in the shape of treating some or all of those assembled with them in the room—"the crowd," as it is often called.

Now what was done upon the occasions in question was this in substance. After the business for which the electors had assembled was over, they left the building in which the meeting had been held and went, some to one tavern some to another—generally, as I infer, to those at which their vehicles were put up, and before leaving for home took drink in the bar rooms, in the usual mode, that of treating one another. I cannot think that doing this is, in any proper or reasonable sense, giving drink or other entertainment to a meeting of electors assembled for the purpose of promoting an election. It is indeed at least doubtful whether there was treating on any of these occasions by any agent of the respondent, and it does appear that there was not any treating by the respondent himself,

but the respondent himself partook of the drink on one at least of these occasions in a bar of a tavern.

I am not in the least disposed to sanction any evasion of the law, or to insist upon too rigid a construction of the provisions of the section. It would indeed be a rare case—if a possible one—that treating should be given literally to a meeting of electors. It was not so in the *Dundas Case*, in which I applied the act: but what was done in this case is not in my judgment within the spirit and meaning of the act. To apply it to what was done in this case, would be in my opinion straining the provisions of this section beyond their legitimate meaning and intent.

Upon another branch of the case I have entertained considerable doubt. I mean in regard to treating by the respondent at various taverns in the course of his canvass, which occupied about three weeks before the polling day. The respondent is a farmer, and has for the last sixteen years followed the business of a drover. He says that it is the practice of drovers to go to taverns as the best places for meeting with farmers and hearing of cattle; that such has been his own practice; and that he has always been in the habit of treating at taverns in the course of his business; and this is confirmed by the evidence of other witnesses. He states that when he became a candidate, he canvassed personally through the Riding, and went to the taverns as good places to meet with the electors; that on these occasions he sometimes treated; sometimes friends who were with him treated; and the treating was sometimes by others who were not friends; and the treating was general to all who might happen to be present. As to its extent, he says it was much less than was his habit in the course of his business—not more, he says, than one-fifth as much. He denies emphatically that he treated with any view of influencing voters; that he made no distinction as to whom he treated; that he had not taken legal advice; that he meant to obey the law; and thought that in what he did he committed no infraction of the law. As to which last, I will merely observe, that if what he did was really an infraction of the law, his being advised, and his entertaining the belief that it was not so, would be no excuse in the eye of the law.

The treating upon these occasions stands upon a different footing from meat, drink, &c., furnished to a meeting of electors, to which I have already adverted.

The law upon this branch of the case differs from the law prescribed in England in this,

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that we have not in this Province any enactment equivalent to section 4 of the Corrupt Practices Prevention Act (Imperial Act of 1854,) which makes corrupt treating a statutory offence. Treating, therefore, not to a meeting of electors can only be reached by the common law, and must be of such a character as to amount to bribery.

It is not contended by Mr. Kerr that the case comes within the old treating act 7 & 8 W. & M. cap. 4, which forbids treating within certain times specified, "in order to be elected or for being elected." I do not know whether it has been decided that the Act is in force in Canada; but it appears to be interpreted in *Hughes v. Marshall*, 2 C. & J. 118, to be in affirmance of the common law, inasmuch as treating "in order to be elected" is only a species of bribery. The same may be said, I think, of the Act of 1854; for to bring a case within that Act, the treating must be with a corrupt intent, i.e., to influence electors to give their votes to the person treating them.

My doubt has been whether the treating by the respondent in the course of his canvass, as described by himself, and to which I have referred, does not come within the definition of corrupt treating given by Mr. Justice Blackburn in the *Wallingford Case*, 1 O'M. & H. 59, that "whenever a candidate is, either by himself or by his agents, in any way accessory to providing meat, drink, or entertainment for the purpose of being elected, with an intention to produce an effect upon the election, that amounts to corrupt treating. Whenever also the intention is by such means to gain popularity and thereby to affect the election, or if it be that persons are afraid that if they do not provide entertainment and drink to secure the strong interest of the publicans, and of the persons who like drink whenever they can get it for nothing, they will become unpopular, and they therefore provide it in order to affect the election—when there is an intention in the mind either of the candidate or his agent to produce that effect, then I think that it is corrupt treating."

I think that the respondent in doing what he did was treading upon dangerous ground; but before holding that his seat is thereby avoided and himself disqualified, I must be satisfied that what he did was done with a corrupt intent; and in judging of this, the general habit of treating in the country and the respondent's own practice may properly be considered.

In the *Kingston Case*, 11 C. L. J. 23, the Chief Justice of Ontario observed: "The general practice which prevails here amongst classes of

persons, many of whom are voters, of drinking in a friendly way when they meet, would require strong evidence of a very profuse expenditure of money in drinking to induce a judge, to say that it was corruptly done, so as to make it bribery, or come within the meaning of "treating," as a corrupt practice at the common law."

In the *Glenarry Case*, Chief Justice Hagarty has referred to the language of English judges upon the question, as to what in their judgment would amount to corrupt treating. I find the case reported in Mr. Brough's very useful little work, "A Guide to the Law of Elections," at p. 21. I quote from the passages given in the judgment of the Chief Justice. "In the *Bowdley Case*, 1 O'M. & H. 19, Blackburn, J., says, 'corruptly means with the object and intention of doing that which the Legislature plainly means to forbid.' In the same reports (p. 195) in the *Hereford Case*, the same judge says that corrupt treating means 'with a motive, or intention by means of it to produce an effect upon the election.' In the *Lichfield Case* (ib. 25) Willes J., says treating is forbidden 'whenever it is resorted to for the purpose of pampering people's appetites, and thereby inducing voters either to vote or to abstain from voting otherwise than they would have done if their palates had not been tickled by eating and drinking supplied by the candidates;' and again that the treating must be done 'in order to influence voters' (p. 26). And so in the same reports in the *Tamworth Case* (p. 88). His lordship also cited the *Coventry Case* (ib. 106) and the *Wallingford Case* (ib. 58), in which it was said by Blackburn, J., that 'the intention of the Legislature in construing the word corruptly was to make it a question of intention.' Also the *Bradford Case* (ib. 37) where Martin, B., as to the meaning of corruptly says: "I am satisfied it means a thing done with an evil mind and intention; and unless there be an evil mind or an evil intention accompanying the act, it is not corruptly done. Corruptly means an act done by a man knowing that he is doing what is wrong, and doing it with an evil object * * * There must be some evil motive in it, and it must be done 'in order to be elected.'"

Without subscribing to every word contained in the passages quoted, they contain no doubt, upon the whole, a sound exposition of the law.

The extent of the treating, the quantity of drink given, should also be taken into account. It was said by Willes, J., in the *Lichfield Case*, 1 O'M. & H. 25, "It may be doubted whether treating in the sense of ingratiating by mere

Elec. Case.] NORTH MIDDLESEX ELECTION PETITION.—BACON V. CAMPBELL. [C. L. Cham.

hospitality, even to the extent of profusion, was struck at by the common law ;" but he goes on to say in effect that it is now forbidden by the Act of 1854, whenever resorted to with the corrupt intent of influencing voters.

In the treating in question there was the reverse of profusion ; there was not more, but much less, than the usual hospitality practised by the respondent, so that there is really no room for saying that the respondent was actuated by the intention of ingratiating himself with the electors by profuse hospitality. I will upon this head quote the language of two learned judges not quoted in the *Glengarry Case*.

In the *Wallingford Case*, 1 O'M. & H. 59, Mr. Justice Blackburn considers that the amount of treating is an element of consideration upon the question of intention, and observes, "When we are considering as a matter of fact the evidence to see whether a sign of that intention does exist, we must as a matter of common sense see on what scale and to what extent it was done. "So Mr. Justice Willes in the *Tamworth Case*, ib. 83, says that it is "obvious that the Legislature did not intend that every bit of bread or sup of drink given to a voter in the course of an election, should have the effect of defeating that election ;" and the same learned judge, in the *Westbury Case*, ib. 50, took occasion to explain what he had done in a previous case, desiring it not to be supposed "that treating by a single glass of beer would not be treating if it were really given to induce a man to vote or not to vote. All that he had ever said was, that that was not sufficient to bring his mind to the conclusion that the intention existed to influence a man's vote by so small a quantity of liquor."

It seems all to come to this. Treating is not *per se* a corrupt act. The intent of the act must be judged of by all the circumstances by which it is attended. If in this case the evidence led me to the conclusion that the respondent did what he did in order to make for himself a reputation for good fellowship and hospitality, and thereby to influence electors to vote for him, I should incline to think it a species of bribery which would avoid the election at common law ; but upon a careful consideration of the evidence, it does not lead me to that conclusion. There was nothing wrong in the eye of the law in the respondent making his canvass by meeting the electors at taverns, and he does not seem to have abused the occasions of so meeting them, by seeking to obtain their votes by pampering their appetites for drink or by other undue means. I apprehend that I must

be able to see with reasonable certainty that he has done this, before I can set aside the election.

COMMON LAW CHAMBERS.

BACON V. CAMPBELL ET AL.

Administration of Justice Act, 1873, sec. 24—Ejectment of defendant—Ejectment.

One of two defendants in an action of ejectment allowed judgment to go by default. *Held*, that he was nevertheless liable to be examined under Administration of Justice Act, 1873, Sec. 24.

[December 14, 1875.—MR. DALTON.]

This was an action of ejectment. The plaintiff claimed title to the lands by reason of a breach of a covenant in a lease not to assign or sub-let without leave. Campbell was sued as the sub-lessee of his co-defendant Hayes, to whom, when served with the writ, he handed it, saying "you must help me out of the difficulty." Hayes defended for the whole of the land, but no appearance was entered for Campbell, against whom judgment was signed by default. Subsequently to this the usual *ex parte* order to examine Campbell was taken out ; but by advice of counsel he refused to be sworn when attending before the special examiner. A summons was then taken out to set aside the order to examine.

Mr. Armour (Crawford & Crombie) showed cause : The order was perfectly regular. The cause was at issue as to the other defendants, and the Act is broad enough to cover this case. Campbell did not necessarily admit the title of plaintiff by allowing judgment to go against him by default. He was still in possession, and it was such a case as was contemplated by the 36 Vict., cap. 14, (Out.) which enables a plaintiff to recover costs against a defendant who does not defend an ejectment suit, on an affidavit of actual adverse possession. The case is somewhat analogous to that of a defendant in equity who disclaims, and who, if costs are asked against him, cannot avoid giving discovery by disclaiming : *Daniell Ch. Pr.*, 5th Ed., 613. Even if the defendant's possession is not adverse, his interest is adverse to the plaintiffs, and this is all that is necessary under the Act. He plainly identified his interest with that of Hayes, by stating that he would have to help him out of the difficulty. Even if Campbell were considered as a mere witness, he could not evade discovery on that ground : *Daniell*, p. 255.

C. L. Cham.] METCALFE V. DAVIS.—WORDEN V. DATE, &C.—MARSH V. SWEENEY. [N. B. Rep.]

Monkman, in reply: The Act contemplated the entire being at issue with the particular defendant sought to be examined. The plaintiff could not say that he had a good cause of action against Campbell on the merits, for the action as regarded him was ended. Unless the plaintiff could make such an affidavit he could not obtain the order to examine.

MR. DALTON—I think the summons should be discharged. The point fixed by the Legislature after which the order may be obtained is merely a matter of procedure, and is meant to prevent the plaintiff from "fishing" in order to frame his next pleading. I do not think the Act intends to restrict the plaintiff to the examination of a party who actively defends the suit. It does not expressly provide, nor even intimate, that the cause should be at issue with the defendant sought to be examined. If the defendant's contention were well founded a defendant might collude with a co-defendant and allow judgment to go against him by default, thus evading discovery, while at the same time he might be the only person in possession of the facts of the case. As the case is a new one the costs will be costs in the cause to the plaintiff.

Summons discharged.

METCALFE V. DAVIS ET AL.

Writ for service within jurisdiction.—Amendment.

[December 23, 1875.—Mr. Dalton.]

A writ for service within the jurisdiction was served on two of the defendants at a place out of the jurisdiction. An application was made to set aside the service on the ground of this irregularity.

Brough showed cause.

Oster contra.

MR. DALTON refused to make the order asked for, as the plaintiff had not been in fault, the domicile of the defendants being within the jurisdiction; but he gave leave to issue, *nunc pro tunc*, a concurrent writ for service out of the jurisdiction, amendment of the copies served to be made in accordance therewith. Costs to be costs in the cause.

WORDEN V. DATE PATENT STEEL CO.

Common Counts—Amendment of particulars.

[December 28, 1875.—Mr. Dalton.]

In this case plaintiff delivered particulars under the common counts, the last two items

of which were for salary from March 1875 to March 1876, and from March 1876 to March 1877 respectively. A summons was taken out to amend the particulars, the ground taken being that under the common counts a claim could not be made for wages not yet due.

J. B. Read showed cause.

Mr. Scott, Robinson and O'Brien contra.

MR. DALTON held that the particulars were incorrect and that the defendants were entitled to have them amended. An order was therefore made to amend the particulars by striking out the last two items and inserting in their place a claim for salary from March 1875 to the time when this suit commenced. Costs to be costs in the cause.

NEW BRUNSWICK.

SUPREME COURT.

MARSH, ASSIGNEE OF MCGUINNESS, AN INSOLVENT V. SWEENEY ET AL.

Insolvent Act of 1869—Fraudulent preferences—Transfer of property by debtor unable to meet his engagements to creditor in payment—Assignee.

A transfer of goods by a party afterwards becoming insolvent to a creditor in payment of his claim is a fraudulent preference and void, if the necessary result of the transfer is to cause the debtor to close up his business and prevent him from paying his other creditors; and the words of the Insolvent Act, "in contemplation of insolvency," do not necessarily mean contemplation of an assignment under the Act. When an official assignee becomes the assignee of the creditors in case there should be any defect in election, he may rely on his position of assignee by operation of law.

[2 PUGLEY REP. 454,—Feb. 1875.]

McGuinness, being a trader and indebted to various persons, made an assignment under the Insolvent Act of 1869 to John L. Marsh, Esq., Official Assignee for York County, on the 23rd of May, 1873. On the 24th of February preceding, the defendants' clerk called upon him at his place of business and required either immediate payment of his indebtedness to the defendants, or a return of the goods—a quantity of boots and shoes which he had purchased of the defendants on credit. McGuinness then informed the clerk that he could not pay defendants, and that if they took the goods he would have to close his business. The defendants' clerk took the goods, consisting of all the boots and shoes in his store, and a few days after McGuinness was obliged to close his business. Beside the goods taken by the defendants,

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McGuinness only had \$950 worth of stock remaining, while his liabilities were \$1475. The plaintiff, as assignee of McGuinness, now brought trover for the value of goods so transferred to defendants. At the trial at the York Sittings, before Allen, J., the learned Judge directed the jury that under the 89th section of the Insolvent Act, the transfer of the goods to the defendants would be void, if at that time McGuinness believed that the necessary result of making the transfer would be to close up his business and prevent him from paying his other creditors; and that the words of the Act, "in contemplation of insolvency," did not necessarily mean, contemplation of an assignment under the Insolvent Act. The jury found that McGuinness knew that the effect of delivering the goods to the defendants would be to compel him to close his business; and that the defendants had probable cause for believing at the time that McGuinness was unable to meet his engagements. Verdict for plaintiff.

A rule nisi was subsequently obtained for a nonsuit, pursuant to leave reserved, or for a new trial.

The ground for a nonsuit was that there was no sufficient evidence of the plaintiff's having been properly appointed assignee; that, though he was also official assignee, and, if there was no election, would, by operation of law, become assignee to the estate, yet, as the plaintiff had claimed as an elected assignee, he could not rely on his position of official assignee.

Ground for new trial: Misdirection as to the transfer.

Fidgeon v. Sharp, 5 Taunt. 539; *Bell v. Simpson*, 2 H. & N. 409; *Atkinson v. Brindall*, 2 Bing. N. C. 225; *Hartshorn v. Slodden*, 2 B. & P. 582; *Crosby v. Crouch*, 11 Ea. 225, were cited.

Gregory shewed cause. There is nothing in the objection that plaintiff was not shewn to have been properly elected assignee, as, even if he was not, then, there being no valid election, he became assignee by operation of law. [Ritchie, C.J. The law clearly must recognise him in one capacity or the other.] It was properly left to the jury to say whether the defendants believed, or had good reason to believe when they took the goods, that it would have the effect of causing the debtor's business to suspend. [Ritchie, C.J. Is not the question put to the jury in England thus: "If the preference is made as the voluntary act of the debtor, it is fraudulent; while, if made through pressure of the creditor, it is not so?"] Sections 86 and 89 of our Act are different from the English Acts, and warranted the direction in this case. "In contemplation of insolvency," does

not mean in contemplation of actually going into the Court, but only in contemplation of the debtor's insolvent circumstances: *Gibson v. Muskell*, 4 M. & G. 169; *Poland v. Glyn*, 4 Bing. 22, note; *Aldred v. Constable*, 4 Q. B. 674; *Gibbins v. Phillipps*; 7 B. & C. 529, 534; *Flook v. Jones*, 4 Bing. 25; *Belcher v. Prittie*, 10 Bing. 408.

It will probably be contended that this was not a transfer but a payment, and therefore, not having been made within thirty days of the assignment, was valid under Section 90. But the payment contemplated by that section must clearly be a payment in money. The case of *Young v. Fletcher*, 3 H. & C. 732, is an additional authority that an assignment by an insolvent trader to a creditor of a part of his property is fraudulent, if the necessary effect is to stop the trader's business, if the assignee is aware of that consequence.

E. L. Wetmore, in support of the rule. The plaintiff having claimed all through the case as an elected assignee, he was bound to establish his election, and cannot fall back on his position of official assignee. Then, as to the transfer. [RITCHIE, C. J. If the debtor makes a transfer which makes him insolvent, must it not be presumed to have been made in contemplation of insolvency?] Not, when it is made more than thirty days before the assignment: then there is no presumption. In *Crosby v. Crouch*, where the defendant, having reason to believe his debtor in bad circumstances, and so believing required and obtained from the debtor security by deposit of goods, the debtor having afterwards become bankrupt, the plaintiff, who as his assignee brought trover for the goods, was nonsuited. That case is very similar to this. Here, as in that case, the transfer was made at the request of the creditor. *Fidgeon v. Sharpe* is a strong case for the defendants: there, where a part of the stock in-trade was actually delivered, it was held that though the debtor contemplates that his trade must cease, and that he cannot pay his creditors unless they give him time, he does not therefore necessarily contemplate bankruptcy. So in *Bell v. Simpson*: A sale by a trader in insolvent circumstances, and on the eve of bankruptcy, of his stock-in-trade and the bulk of his property to one of his creditors, the consideration being in part an old debt, is not *per se* an act of bankruptcy, though the effect is to stop the trading. The learned Judge should have left it to the jury to say whether the transfer was made in contemplation of McGuinness making an assignment under the Act. That would have been according to the direction

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in *Atkinson v. Grindall*, in which case Williams, J., told the jury that to entitle the plaintiff to recover, the debtor must have had a bankruptcy in contemplation at the time of the payment; that it was not enough that he was in insolvent circumstances and contemplated insolvency, and the direction was held to have been correct. But, in addition to the support of the defendants' position derived from these authorities, here the debtor actually swore that he did not contemplate going into the Court. (RITCHIE, C. J., referred to *Smith v. Cannon*; 2 E. & B. 35. *Allen v. Bonnett*; L. R. 5 Ch. App. 577. In this case the defendants have subtracted so much of the insolvent's property as to make him more insolvent and giving no advantage to the bulk of the creditors. Where, as in the present case, the insolvent said to the defendants' agent, "If you take the goods, I must close my business," and the defendants take them, must they not both be held to contemplate bankruptcy?) If a transfer, no matter at what time given, may be set aside on the debtor going into the court, in every case where the assignment may be traced to the transfer, creditors would have no security. The burthen, it is submitted, is on the creditors to show that the transfer was made in contemplation of going into the court. [RITCHIE, C. J., referred to *Stewart v. Moody*, 1 C. M. & R. 777; *Johnson v. Fessenden*, 25 Beav. 88; *Stanger v. Wilkins*, 19 Beav. 626.]

Cour. adv. vult.

The judgment of the court was now delivered by :

RITCHIE, C. J.—The first question in this case is, whether the plaintiff proved his appointment as assignee of the insolvent's estate. It was admitted that he was the Official, or Interim Assignee; and it therefore becomes immaterial whether there was any proper appointment by creditors or not; because by the 6th Section of "The Insolvent Act of 1869," it is declared that, "if no assignee be appointed at the meeting of the creditors; or if the assignee named refuses to act; or if no creditor attends at such meeting, the interim assignee shall be the assignee of the estate of the insolvent." If the creditors were not duly represented at the meeting, and no one was authorized to vote in the choice of an assignee, the plaintiff became assignee by virtue of the Act, and had a right to maintain the action.

The other question is, whether the Judge misdirected the jury in telling them that, under the 89th section of the Insolvent Act, the trans-

fer of the goods by McGuinness to the defendant, would be void, if at that time McGuinness believed that the necessary result of making the transfer would be to close up his business, and prevent him from paying his other creditors; and that the words of the Act, "in contemplation of insolvency," did not necessarily mean contemplation of an assignment under the Insolvent Act.

The words of the section are:—"If any sale, deposit, pledge or transfer be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor; or if any property, real or personal, goods, effects, or valuable security, be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale, &c., shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee, in any court of competent jurisdiction; and if the same be made within thirty days next before the execution of a deed of assignment, or the issue of a writ of attachment under the Act, it shall be presumed to have been so made in contemplation of insolvency."

In this case the transfer of the goods was made more than thirty days before McGuinness executed the deed of assignment under the Act; therefore the onus was upon the plaintiff to prove that it was made in contemplation of insolvency; and we think he did prove it by the evidence of McGuinness, who told the defendants' clerk, at the time he took the goods, that he (McGuinness) would have to close his shop, as half his stock was gone. It was undisputed that McGuinness could not pay the defendants, who were pressing him, and required an immediate arrangement, either by payment, or return of the goods; and as McGuinness had then no means of payment, his only alternative was, to give up the goods to the defendants, the consequence of which was, that he had not property enough to pay his other creditors, and was obliged to close his business a few days afterwards. He said that he knew at that time that he could not pay his debts, but thought that if he had been allowed time till the summer, he could have paid them, or made arrangements which would have been satisfactory to all parties. He admitted, that a short time before he gave up the goods to the defendants, he had stated that unless business improved, he would be obliged to close; but he said that before he arranged to give up the goods to the defendants, he did not contemplate going into insol-

veny. The jury expressly found that McGuinness knew the effect of delivering the goods to the defendants would be to compel him to close his business; and that the defendants had probable cause for believing at the time that McGuinness was unable to meet his engagements.

We think the jury were fully warranted by this evidence in finding as they did: indeed we think they would have been justified in finding that he contemplated going into insolvency. But the question is, whether contemplation of insolvency, means contemplation of making an assignment under the Insolvent Act. In *Gibbins v. Phillips*, 7 B. & C. 533, Bayley, J., says, in answer to the argument of the counsel, "You seem to treat contemplation of bankruptcy, as the contemplation of a commission of bankruptcy, which is not the legal meaning of that expression." And in giving judgment in the same case, he says, "If the party securing the debt, knew himself to be in such a situation that he must be supposed to have anticipated that a bankruptcy would in all human probability follow, then we think it was fraudulent within the meaning of the 6 Geo. 4 c. 16. In this sense, contemplation of bankruptcy has always been considered evidence of fraud, although the party may not have expected the actual and immediate issuing of a commission." In *Aldred v. Constable*, 4 Q. B. 674, where the question was whether a warrant of attorney given by a debtor was a fraudulent preference under the Bankrupt Act, Lord Denman, delivering the judgment of the court, says: "We cannot conceive that a particular act of bankruptcy must have been in contemplation to make a preference fraudulent and void. We do not find that bankruptcy must have been regarded as absolutely unavoidable. * * * If the debtor at the time of giving the warrant of attorney, considered that he was likely, from the condition in which he then stood, to become a bankrupt, and that he gave the warrant of attorney with the intention of securing his father's debt, when he knew that his assets were inadequate to the payment of all his creditors, the proof of fraudulent preference would be complete."

In the present case, the insolvent knew, before he gave up the goods, that he could not pay his debts, and anticipated that he might be obliged to close his business, and when he delivered the goods to the defendant, all doubt on that point seems to have been removed from his mind, because, as he said, "half his stock was gone," and he knew that the remainder of his assets, even if he could have collected the debts

due him, were insufficient for the payment of his other creditors. The necessary consequence of the transfer of the goods was to make McGuinness insolvent; because a man must be taken to intend that which is the necessary consequence of his act: *Stewart v. Moody*, 1 C. M. & R. 780.

The defendants knew, through their agent by whom they dealt with McGuinness, (the knowledge of their agent being their knowledge) that the effect of their taking the goods would be to stop McGuinness' business, and prevent him from paying his other creditors; it was therefore clearly an undue preference given to the defendants over the other creditors of the insolvent, and being so, it was void under the Act.

Rule discharged.

UNITED STATES REPORTS.

SUPREME COURT OF VERMONT.

JOHNSON v. TOWN OF WARBURGH.

Sunday Travelling.

One travelling upon the Sabbath, without excuse, cannot maintain an action against the town for any damage he may suffer, through defects in its highway.

[Am. Law Register, 645.]

Case for injuries received while travelling on a highway within the defendant town. The facts sufficiently appear in the opinion of

Ross, J.—The necessity which will excuse one for travelling on the Sabbath must be a real and not a fancied necessity. The statute reads: "No person shall travel on the Sabbath or first day of the week, except from necessity or charity:" Gen. St. ch. 93, sect. 3. It is not an *honest belief* that a necessity exists, but the *actual existence of the necessity*, which renders travelling on the Sabbath lawful.

The jury, under proper instructions, have found, that the travelling of the plaintiff on the occasion when he received his injury was not from necessity, and therefore unlawful. They have also found, that he has suffered damage from injuries received by reason of the insufficiency of a highway which it was the duty of the town to keep in good and sufficient repair. One this verdict the defendant moved for judgment in its favour, which the court below *pro forma* overruled and rendered judgment for the plaintiff against the exception of the defendants. Thus the question is distinctly presented for decision, whether a town is liable for damages sustained through the insufficiency of a highway

which it is legally bound to keep in repair, to one who is unlawfully travelling on such highway or travelling on the Sabbath without a legal excuse. The question is not whether the plaintiff is barred from recovering damages, which he would otherwise be entitled to recover, because he was at the time he received the injury committing an unlawful act, or travelling at an unlawful rate of speed, but, whether the town was under a legal duty to furnish him a safe highway to travel over, when at that precise time he was forbidden by law to travel over the highway?

The precise question is now for the first time presented to this court for decision. In *Abbott v. Walcott*, 38 Vt. 666, a question somewhat analogous was decided. The plaintiff in that case was injured from the springing of a bridge while he was trotting his horse upon it. The bridge was of such construction that, by law, the plaintiff was forbidden to drive faster than a walk thereon. The plaintiff might lawfully travel on the bridge, but not at the rate of speed he used. It was held he could not recover. The decision is put upon two grounds. First, that the plaintiff's illegal act in driving faster than a walk must have contributed to the springing of the bridge, and so contributed to the happening of the accident which caused the injury. Second, if this was not so, that inasmuch as it was conceded that "the bridge was good and sufficient except in the matter of its springing when driven upon on the trot," and as the plaintiff had no right to use it in that manner, the town was under no legal obligation to provide a bridge for such use; in other words, that the town had fully discharged its duty towards the plaintiff, in that it had provided as good a bridge as the law required, and that the accident happened, and the injury was occasioned, by the unlawful act of the plaintiff, or of one Carlyle who was at the time also trotting his horse on the bridge, and not from any failure of the town to discharge its duty in the premises.

The question at bar has arisen in other states, but the courts of those states have not been so fortunate as to arrive at the same solution of it. The courts of Massachusetts and Maine have repeatedly decided that a plaintiff could not recover under such circumstances: *Jones v. Andover*, 10 Allen 18; *Bosworth v. Swaney*, 10 Metc. 353; *Hinckley v. Penobscot*, 42 Me. 69; *Bryant v. Biddeford*, 59 Me. 193. In some of the other states, it has been held that the fact that the plaintiff was travelling on the Sabbath in violation of law, did not relieve the

town from its liability for damages sustained through the insufficiency of its highway. So far as I have had access to such decisions, they assume that the town was liable to the plaintiff for the insufficiency of its highway, and proceed to consider whether the unlawful act of the plaintiff relieved the town from such liability. *Sutton v. Winoosqui*, 29 Wis. 21, is one of the latest decided cases of this kind, and one on which the plaintiff especially relies. It therefore, demands some consideration. In the opinion which was delivered by C. J. Dixon, very many of the cases are reviewed. It assumes that the decision of the cases against the right of the plaintiff to recover, rests either upon the ground that the plaintiff's illegal act of travelling on the Sabbath contributed to the happening of the accident, and for that reason deprived him of the right of recovery, or, that the fact that he was engaged in an unlawful act at the time he received the injury bars his right of action.

Both of these grounds are combated earnestly, and I think successfully.

It is difficult to maintain that the traveller's illegal act, in such cases, contributed to the happening of the accident. The insufficiency of the highway remaining the same, and the traveller being at the place of the insufficiency under the same circumstances, on any other day of the week, the same accident and injury would have befallen him.

A contributory cause is one which under the same circumstances would always be an element aiding in the production of the accident. The fact that the traveller is unlawfully at the place of the accident does not contribute to the overturn of his carriage, or to the production of the accident. The same forces and causes would have overturned the carriage or caused the accident as well on a week-day as on the Sabbath, as well when the traveller was lawfully at the place of the accident as when unlawfully there. It is sometimes asserted that if the injured party had not been unlawfully travelling he would not have been at the place of the insufficiency and would not have received the injury. The same is true of all injuries on highways. The same causes and forces produce the accident in the one as in the other case; and the fact that the injured one is present unlawfully is not a factor which contributes to the happening of the accident. Hence the decisions against the traveller's right of recovery must rest upon some other basis than that his

unlawful act, or travelling unlawfully, was a contributory cause to the happening of the accident within the legal meaning ordinarily attached to these words.

Neither, as I think, can the fact that the party receiving the injury was at the time of the injury engaged in an unlawful act, deprive him of the right of recovery. If the plaintiff, at the time of the injury, had been profaning the name of the Deity, he would have been engaged in an unlawful act: but no one would hold that such an act would bar him from recovering of the town if it were otherwise liable for the injury sustained. The town could not relieve itself from the consequences of its own wrong or neglect by alleging the illegal act of the plaintiff. Punishments are provided for all unlawful acts, but their administration is not committed to the discretion of towns; neither has a town the right to add to the prescribed penalty the injuries resulting from its own wrongful act or neglect. The travelling by the plaintiff without excuse on the Sabbath was not an offence against the town, and it cannot excuse its wrong done to him, if wrong it be, by recrimination. The allegation of a wrong done by a plaintiff to a third party never furnished a defendant a good legal answer for a wrong done by himself to that plaintiff. Several of the cases cited by the plaintiff sustain and illustrate this proposition. There may be cases in which a party injured through the insufficiency of a highway while engaged in an unlawful act, could not recover, and in which the unlawful act would be the remote cause of his inability to recover. It may be questionable whether a criminal party, like a thief, robber or kidnapper, who should be injured while using a highway in transporting and securing the fruits of his crime, could recover for such injuries (though occasioned by the insufficiency of the highway) of the town ordinarily responsible for such insufficiency. In all such cases, I apprehend, his unlawful act would not bar the criminal party from sustaining an action which had once attached against the town, but that no such right of action would arise, because the town would be under no obligation to furnish him a safe highway for any such purpose. I think it is quite clear that the decisions against the right of the plaintiff to recover in such cases, if sustainable, must rest upon some other ground. While I am quite ready to yield my assent to the reasoning of the learned judge who delivered the opinion in the case last cited, I am not so well satisfied that the opinion meets the real point raised for decision. As heretofore

remarked, the question is not, Is the plaintiff debarred from recovering for injuries sustained through the insufficiency of a highway, and which he would otherwise be entitled to recover, because he was at the time he received the injuries engaged in an unlawful act? but, Was the town under a legal liability to furnish him a safe highway to travel on, at a time when he was, by law, forbidden to travel on it? The liability of towns for the sufficiency of their highways is wholly imposed by statute. The right of the traveller to recover for injuries sustained through self insufficiency is also conferred by statute. No such liability or right existed at common law. The duty and liability of towns in regard to their highways are due only to travellers, to that class who have the right to pass and repass thereon, and continue only so long as they are in the exercise of that right. When one ceases to use a highway for the purpose of passing and repassing thereon, the duty and liability of the town toward him in regard thereto cease. This has been repeatedly decided: *Spencer v. City of Salem*, 3 Allen 374; *Richards v. Enfield*, 13 Gray 344; *Blodgett v. City of Boston*, 8 Allen 237; *Stimson v. Gardiner*, 42 Me. 243; *Urcutt v. Bridge Co.*, 53 Me., 500; *Baxter v. Winoski Turnpike Co.*, 22 Vt. 124; *Abbott v. Walcott*, 38 Vt. 666; *Sykes v. Pawlet*, 43 Vt. 446; *Hayward v. Rutland*, unreported.

We do not think any good lawyer would contend that a town would be liable for damages sustained through the insufficiency of one of its highways, by a circus performer who might chance to pitch his tent and establish his ring on the highway, and who should happen to be injured while performing his feats of horsemanship or of lofty tumbling. In such a case a town would not be liable, because it would not be under any legal duty to provide him a highway for any such purpose. Many cases might be supposed in which the town would not be liable to one injured through the insufficiency of one of its highways, because the one receiving the injury would not be using it for a purpose contemplated by the statute, and hence the town would be under no duty toward him. As a town is liable for such injuries only by force of the statute, its liability must be limited to those cases in which the statute has imposed the duty upon it to provide a safe highway for the injured party in the particular use to which he was, when injured, putting it. It is competent for the legislature when creating this duty and liability, or subsequently, to prescribe the limitation thereof. It may be limited to a par-

U. S. Rep.]

JOHNSON v. TOWN OF WARBURGH.

[S. C. Vermont.]

ticular class of individuals, or to special occasions. Is it reasonable to suppose that the statute was intended to impose this duty and liability in behalf of a person who was forbidden to use all highways for the purpose of travel, and at a time when he was so forbidden to use them? Can he be a traveller within the purview of the statute, who is forbidden to travel? The question is its own answer. The statute imposing this duty and burden was first enacted March 3rd, 1797: Tolman's Compilation of St., vol. 1, 452, sec. 13. The same has continued in force, with some immaterial modifications so far as regards this question, to the present time. On the same March 3rd, 1798, was enacted the statute against travelling on the Sabbath, not exactly in its present form, but in substance the same: Tolman's Compilation, vol. 1, c. 27, §§ 1 and 6. Thus at the same time the duty was imposed upon towns to provide safe highways, and they were rendered liable for injuries sustained through the insufficiencies of such highways, all persons were forbidden to use them on the Sabbath, except for certain purposes. The statute limiting their use furnishes the measure of the duty and liability imposed. In other words, the duty and liability imposed are co-extensive with the purposes for which persons can legitimately use the highways, and no greater. A statute which forbids the use of highways for certain purposes, or on certain days, or in a certain manner, would limit the duty and liability of towns in regard thereto. The statute has limited the amount of load one may carry on a highway to 10,000 pounds. He who attempts to draw a greater load, does it at his own risk, because when he puts himself in such a position the town owes him no duty and is under no liability for injuries received through the insufficiency of its highways. The plaintiff, when injured, was forbidden by law to use the highway, and by reason thereof the defendant town owed him no duty to provide him any kind of a highway, and therefore was under no liability for any insufficiency in any highway. So far as the town was concerned, he had no business to be at that place at that time, and hence he was there at his own risk. If he has sustained damages they fall upon himself and not upon the town, because the statute has not made the town liable for them. The judgment of the County Court is reversed, and judgment is rendered for the defendant to recover its costs.

(Note by Editor of American Law Register.)

This case presents no inconsiderable difficulty, and at first view there certainly are many de-

cisions which look as if this decision should have been the other way. The English statute 29 Ch. II. requires that "no tradesman, artificer, workman, labourer or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's day (works of charity and necessity only excepted)," and the English courts have decided that work which is not done in the exercise of one's ordinary calling, although of a secular character, is not within the statute: *Dury v. Defontain*, 1 Taunt. 131; *Scarfe v. Morgan*, 4 M. & W. 270; *Bigbee v. Levi*, 1 Car. & P. 180. In New Hampshire it has been decided that a person travelling on Sunday may recover, if injured by a fault in the road which the town was bound to repair: *Dutton v. Weare*, 17 N. H. 34. But the New Hampshire statute contains a provision that no one shall labour or recreate on Sunday to the annoyance of other persons. The United States Supreme Court have decided that, where a railroad company employed contractors to build a bridge, and for that purpose drove piles in a river, and owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company were responsible for the injury; and that the vessel so injured was prosecuting her voyage on Sunday is no defence for the railroad company: *Phila. &c., R. Co. v. Phila. &c., Tow-boat Co.*, 23 How. 209. And in the course of his opinion Mr. Justice Grier remarks: "It is true that cases may be found in the state of Massachusetts (see *Bosworth v. Swansey*, 10 Met. 378, and *Gregg v. Wyman*, 4 Cush. 322), which on a superficial view might seem to favour this doctrine of set-off in cases of tort. But those decisions depend on the peculiar legislation and custom of that state, more than on any principle of justice or law." And in another part of his opinion, Mr. Justice Grier refers to *Mohney v. Cook*, 26 Penn. St. 342, in the conclusion of which he concurs, and in that case Mr. Justice Lowrie lays down the law, that a private individual or corporation is liable to a person travelling on Sunday, if such person is injured by an obstruction which the defendants have placed in the highway, on the ground that "it would work a very doubtful assistance to morality if we should allow one offender against the law, to the injury of another, to set off that he too is a public offender;" and the same principle is laid down in *Elchberry v. Levielle*, 2 Hilton (N. Y.) 40.

But Mr. Justice Lowrie remarks, extra-judicially indeed, that the case may be different when the state or any of its subdivisions is the

REVIEWS—CORRESPONDENCE.

defendant. In the principal case the question is presented in a somewhat different aspect. And the cases do not seem altogether consonant with each other, as to how far one travelling the highway in violation of some statute is thereby barred of all remedy for injury through defects in the road. It has been held that the violation of the statutes directing which side of the road one must take, as that in passing another team one must turn to the right, or a statute directing the rate of speed, as that one must not drive faster than six miles an hour, where the violation of the statute does not injure another person, or contribute to the injury received by the plaintiff, will not preclude his recovery for an injury through defect of the highway: *Baker v. City of Portland*, 10 Am. Law Reg. N. S., 559, 563, where this general question is considerably discussed: *Gale v. Lisbon*, 52 N. H. 174. We have already mentioned that it has been decided in New Hampshire that the Sunday law is of this character. But the Massachusetts courts have decided that a violation of the Sunday law is such a breach of faith towards the state, that the offender cannot come to her courts to obtain reparation for the injury received during the time he was committing the offence: *Bonworth v. Swansea*, 10 Metc. 363. The statute prohibiting travelling on Sunday in Massachusetts is identical with the one in Vermont, and is made more sweeping than in other states, and will bear the construction which the Massachusetts courts have put upon it. And the decision in this case follows their construction. But as the Massachusetts courts have in *Hall v. Corcoran*, 107 Mass. 251, reelected from the ground taken in *Way v. Foster*, 1 Allen 408, and in *Gregg v. Wyman*, 4 Cush. 322, that no action will lie for an injury to a horse from immoderate driving if he has been intrusted to the defendant to be driven in violation of the Sunday law, it is possible that they may modify still farther the effect of this statute. But, at present, the effect of the extreme view taken of the Sunday law by the Massachusetts courts, and others following in their wake, seems to be, to render all violators of that law, for the time being, virtual outlaws, as to all injuries they may happen to suffer, through the illegal conduct of others, whether by way of omission or commission. It seems to be applying the rules of equity to those who complain of the illegal conduct of others, that he who would have equity must first do equity, or that he would thrive by the law must first be sure to live by it.

REVIEWS.

DE LAUDIBUS LEGUM AGNILLÆ. A treatise in commendation of the laws of England, by Chancellor Sir John Fortescue. Cincinnati: Robert Clarke & Co., 1874.

The edition of this fine old work of Sir John Fortescue now before us is a reproduction of the translation by Francis Gregor, as edited by Andrew Amos in 1825, together with a life of Sir John Fortescue by his descendant, Lord Clermont. Lord Clermont's edition was printed for private circulation and some important public libraries only; but hearing that these publishers were reproducing this well-known "legal classic," he kindly placed his edition at their service. The result is the most perfect and complete edition that has yet appeared. It is a very interesting book now, even to the general reader. As to the matter of the work itself, we cannot do better than quote what is said about it in *Ken's Commentaries*:

"It displays sentiments of liberty and a sense of limited monarchy, remarkable in the fierce and barbarous period of the Lancastrian civil wars, and an air of probity and piety runs through the work. This interesting work of Fortescue has been translated from the Latin into English, and illustrated with the notes of the learned Selden; and it was strongly recommended in a subsequent age by such writers as Sir Walter Raleigh and Saint Germain. And while upon this author, we cannot but pause and admire a system of jurisprudence which, in so uncultivated a period of society, contained such singular and invaluable provisions in favour of life, liberty and property, as those to which Fortescue referred. They were unprecedented in all Greek and Roman antiquity, and being preserved in some tolerable degree of freshness and vigour amidst the profound ignorance and licentious spirit of the feudal ages, they justly entitle the common law to a share of that constant and vivid eulogy which the English lawyers have always liberally bestowed upon their municipal institutions."

The publishers have done their duty in presenting a volume which is most creditable in its typographical appearance and arrangement.

DIGEST OF ONTARIO REPORTS, by C. Robinson, Q.C., and F. J. Joseph, barrister-at-law: Rowsell & Hutchison.

Part V. concludes the title "County Courts," and brings us aptly to "Demurrage." One of the most important

CORRESPONDENCE.

subjects in this number is that of criminal law. It is divided into no less than fifty-one heads, given in alphabetical order. Each succeeding number makes the necessity of the work to every practitioner more apparent. We trust every effort will be made to complete it with as little delay as possible.

CORRESPONDENCE.

Deputy Clerks of the Crown and Masters in Chancery acting as agents.

TO THE EDITOR OF THE LAW JOURNAL.

What is your opinion as to the propriety of Deputy Clerks of the Crown or Masters in Chancery acting as agents for country practitioners,—issuing writs, signing judgments, making searches and process, filing bills and other proceedings, and generally doing the work of an attorney or town agent and solicitor? To my old-fashioned notions of propriety and law, and the proper duty of these officials, they have no right to act in such capacity. The reasons are too obvious to need mention. Would you kindly say a word in reply? LEX.

[Our opinion quite coincides with that of our correspondent; and we are satisfied that if such conduct were represented to the proper authorities, it would be at once prohibited. As to Deputy Clerks of the Crown, Reg. Gen. 145, was evidently intended to prevent such irregularities.—ED. L. J.]

Division Courts—Garnishing Debts—Jurisdiction.

TO THE EDITOR OF THE LAW JOURNAL.

SIR.—A case of some novelty and interest has recently arisen under the clauses in the Division Court Act relating to the garnishment of debts. The point is whether, when the garnishee is indebted to the primary debtor in a sum exceeding the jurisdiction of the court, there can be an order made on behalf of the primary creditor to garnish to the amount of his claim, the same being within the jurisdiction. E. G., the garnishee, owes the primary debtor \$400. The latter is indebted to the primary creditor in the sum of \$75. Can an order be sustained

against the garnishee to pay the \$75 as part of the \$400 due the primary debtor?

Before the judge can make a garnishee order, he is required to decide on the indebtedness of the garnishee, and in this particular case he must adjudicate on the whole \$400; which being beyond the jurisdiction of the court, it is submitted he has no right to do.

In the case I speak of, a summons has been obtained for a prohibition, and the question will shortly be argued. It must be confessed that the point is not free from doubt; and the writer has not been able to discover any case in point. It seems strange if a primary creditor is to be debarred from proceeding in the Division Court to garnish a claim owing the primary debtor, in every case in which that claim exceeds \$100. In what court would he proceed in such case? What determines the jurisdiction?—the amount of the primary creditor's claim, or the amount of the garnishee's indebtedness? We should be glad to know if any of your readers in other counties have heard of the point being raised.

Yours truly,

BARRISTER.

Examinations—The old law and the new.

TO THE EDITOR OF THE LAW JOURNAL.

DEAR SIR,—Will you kindly answer the following question through the columns of your journal: When the law as now established in Ontario differs from the law as laid down in the text-books—as, for instance, the difference between the law as to the descent of real property now prevailing in Ontario and the law on the same subject as laid down in “Williams on Real Property”—is a student presenting himself for examination at Osgoode Hall liable to be questioned both as to the former and latter state of the law?

Yours truly,

SECOND YEAR.

[We should say decidedly yes, not only from the fact that you are supposed to be thoroughly familiar with the books appointed for examination, but also because the only thorough way to learn the new law is by understanding the old.—EDS. LAW JOURNAL.]

FLOTSAM AND JETSAM.

FLOTSAM AND JETSAM.

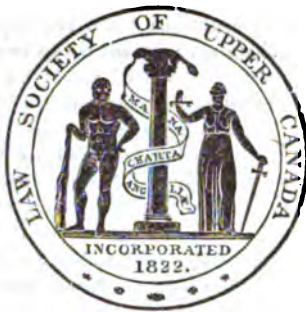
A FRIEND sends us the following laudatory notice of a citizen of Storm Lake City in Iowa, published in a newspaper there. It opens up a new field of thought for some of our young practitioners in the country where litigation is slack, especially about Christmas times, when "notions" might be expected to be in demand:—"Mr. Chamberlin is one of Storm Lake's oldest citizens, having located here even before the present town site was platted. He is a hard worker and has built up an extensive practice and business. He is a young man of good abilities and will succeed in the world. He has recently built a large office, and in addition to his law and insurance business has fitted up a portion of his room for the sale of notions, &c. He employs a clerk, Mr. Garrett, who will be found ready to show customers what he has for sale."

THE LONG AND SHORT OF FUSION.—It seems that there is a grave omission in the Judicature Act, which has been detected in the legal offices, on the subject of writs. To the ordinary reader the Act of Parliament appears to provide everything necessary. It prescribes how this unwelcome document is to begin in the name of Queen Victoria, and to end with an attestation by the Lord Chancellor, and in what ungentle terms the threats in the middle are to be conveyed. But, by a strange oversight nothing is said on the important point of its shape. The old common law writ, as most people know, although some might be unwilling to confess the information, was a long slip of parchment with the "threatening letter" written longwise across it. Those who have ever reached the dignity of being served with a copy of a bill in Chancery will remember that the menace of imprisonment and other horrible penalties which appeared upon it were conveyed by words written the short way of the paper. Here, then, was a difficulty. It is true that the Chancery and Common Law officials are now, in theory, merged into one; but to ask either body to abandon its peculiar mode of writing writs would be the same as asking a soldier to give up the banner under which he fights. To give way would be, perhaps, to admit that Common Law is narrow, or that equity is broad, or some other allegorical meaning hidden under these symbols. The officials are gallant gentlemen, and they would rather die first. Accordingly, Chancery officials repudiate longitudinal writs, and refuse to seal them, while Common Law officials reject latitudinal writs with equal scorn. Some mur-

muring, no doubt, has taken place among lawyers who have not mastered the distinction, and even the words "reel tape" and "the difference between tweedledum and tweedledee" have been heard; but this is mere ignorance. It is remarkable that neither Lord Selborne nor Lord Cairns appreciated the difficulty. Great enterprises have often been foiled by a hitch in a matter of detail, and the fusion of Law and Equity seems endangered unless something can be done. The Chancery officials cannot be expected to adopt the practice of Common Law, nor *vice versa*. The only thing possible is a compromise; and if an order of the Supreme Court, or, better still, an Order in Council or an Act of Parliament, were to provide that writs shall be written diagonally across the paper, perhaps the long and the short of the matter might be arranged by a mutual concession.—*Hour*.

"The common law system of special pleading," said the late Mr. Justice Grier, "matured by the wisdom of ages, founded on principles of truth and sound reason, has been ruthlessly abolished in many of our states, who have rashly substituted in its place the suggestion of sciolists, who invent new codes and systems of pleadings to order. But this attempt to abolish all species and establish a single genus, is found to be beyond the power of the legislative omnipotence. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of all pleadings, and introduce on the record an endless wrangle in writing, perplexing to the Court, delaying and impeding the administration of justice." *McFaul v. Ramsey*, 20 Howard, 523. And in a later case the same learned judge observed: "It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the Court to follow their example. If any one should be curious on this subject, the cases of *Randon v. Toby*, 11 Howard, 517; of *Bennett v. Butterworth*, 11 Howard, 669; of *McFaul v. Ramsey*, 20 Howard, 523, and *Green v. Custard*, 23 Howard, 483, may be consulted." *Furns v. Tesson*, 1 Black, 315.

LAW SOCIETY, MICHAELMAS TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODS HALL, MICHAELMAS TERM, 39TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law :

No. 1342—KENNETH GOODMAN.

THOMAS HORACE MCGUIRE.

GEORGE A. RADENHURST.

EDWIN HAMILTON DICKSON.

ALEXANDER FERGUSON.

DENNIS AMBROSE O'SULLIVAN.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit.

The following gentlemen received Certificates of Fitness :

THOMAS C. W. HASLETT.

ANGUS JOHN MCCOLL.

DENNIS AMBROSE O'SULLIVAN.

DANIEL WEBSTER CLENDENAN.

GEORGE WHITFIELD GROTE.

CHARLES M. GARVET.

ALBERT ROMAINE LEWIS.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

No. 2585—GOODWIN GIBSON, M.A.

JOHN G. GORDON, B.A.

WALTER W. RUTHERFORD, B.A.

WILLIAM A. DONALD, B.A.

THOMAS W. CROTHERS, B.A.

JOHN B. DOW, B.A.

JAMES A. M. ATKINS, B.A.

WILLIAM M. READE, B.A.

EDMUND L. DICKINSON, B.A.

CHARLES W. MORTIMER, B.A.

Junior Class.

ROBERT HILL MYERS.

WILLIAM SPENCER SPOTTON.

WILLIAM JAMES T. DICKSON.

WILLIAM ELLIOTT MACARA.

JAMES ALEXANDER ALLAN.

WALTER ALEXANDER WILKES.

WILLIAM ANDREW ORR.

ALFRED DUNCAN PERRY.

JAMES HARTY.

HERBERT BOLSTER.

JOHN PATRICK EUGENE O'MEARA.

CHARLES AUGUSTUS MYERS.

CHARLES CROSBIE GOING.

DAVID HAVELOCK COOPER.

EMERSON COATSWORTH, JR.

WILLIAM PASCAL DESROCHE.

FREDERICH WM. KITTERMANSTER.

Articled Clerk.

JOHN HARRISON.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Watkins on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLIARD CAMERON,

Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR FEBRUARY.

1. Tues...Intermediate Examinations.
2. Thurs.Examination for admission. Candidates for call to pay fees.
4. Frid...Examination for call.
6. SUN...5th Sunday after Epiphany.
7. Mond. Hilary term begins. Secretary of Law Society to make out list of Bar entitled to vote for Benchers.
9. Wed...Last day for setting down rehearing in Chancery.
10. Thurs.Queen Victoria married, 1840.
11. Frid...Lord Sydenham, Governor-General, 1840. Paper Day, Q.B.
12. Sat....Paper Day, C.P.
13. SUN...Septuagesima S.
14. Mond...Paper Day, Q.B.
15. Tues...Paper Day, C.P. Last day to move against Municipal Elections.
17. Thurs.Rehearing term in Chancery begins.
19. Sat....Hilary term ends. Last notice for notice for call.
20. SUN...Sexagesima S. Tithes abolished in U. C., 1523
27. SUN...Quinquagesima S.
29. Tues...Shrove Tuesday.

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Canada Law Journal.

Toronto, February, 1876.

THE first part of the Revised Statutes of Ontario has been issued by the Commissioners. It is called, "Rough draft to be distributed for the purpose of receiving suggestions before the final review of the work by the Statute Commissioners and its submission to the Legislature." We refer to this subject at length in another place.

IN *Woodruff v. Mosely*, 19 L. C. Jur. 169: Mr. Justice Sanborn, delivering the opinion of the Court of Queen's Bench, held that the mere importer of an invention, which has been patented for many years in the United States by another person, is not entitled to a patent therefor under the Dominion Patent Act of 1869.

THE Supreme Court of Pennsylvania, in *Udderzook's case*, has lately held that in a trial for murder a photographic likeness is admissible in evidence for the purpose of identifying the person photographed, and this without any further proof of its being a correct resemblance, as is required in the case of paintings. The Court said that they could not refuse to take judicial cognizance of the process as a proper means of producing correct likenesses.

THE English Master of the Rolls (Sir George Jessel) not unfrequently says shrewd things on the bench, which it is well "to make a note of." For instance, in *Jones v. Bygott*, 23 W. R. 944, he artistically exposes one of the absurdities that equity delights to honor, in this pleasant way: "The doctrine as regards constructive notice, by reason of the knowledge of an agent or solicitor, has

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been restricted in modern times to some extent, perhaps not to so great an extent as it ought to be, but to some extent in the direction of common sense."

THE *Central Law Journal* calls attention to a decision of the Court of Queen's Bench for Quebec, in *The Corporation of Montreal v. Doolan*, in which it was held by a majority of judges that a municipal body is liable in damages for an assault committed on a citizen by a policeman in the pretended discharge of his official duty. The case rests upon French authorities, and is opposed to the law as expounded by English and United States Courts. But the *Journal* expresses the opinion that justice and public policy demand a revision of the law in this matter, and that it is better to make the corporation responsible for the wrongful acts of its public officers, done in the course of their official relations, and under colour of their office.

THERE has been some discussion in the lay papers as to propriety of providing a cheaper and more expeditious mode of serving process and papers, where the person to be served lives at a long distance from the sheriff's office. It is unnecessary to put the case from the sheriffs' point of view, as they, like the registrars, are quite able and willing to take care of themselves. One sheriff that we have heard of used to send papers by mail to a process-server living at a village some thirty miles distant from the county town, for service in the former place. This person served the paper on his fellow villager, and swore that he necessarily travelled the thirty miles and back to make the service, and the sheriff meekly pocketed the fees thus ingeniously obtained. The beauty of it is, that lawyers get the credit of charging litigants with enormous bills of costs, whilst the truth is that probably

one-half the amount has already been paid out to sheriffs, registrars, &c., and for law stamps.

DURING the present session of the Ontario Assembly, the lawyers have not been idle. Law Reform is still the order of the day; and the Jury system, that fertile subject for experiment, has not been left unassailed. Mr. Bethune the other day introduced a bill to alter the rule in civil cases, requiring the verdict of juries to be unanimous. He proposed that, after a jury has been out an hour, it should be permitted to render a verdict of eleven of their number; after an absence of two hours, a verdict of ten; and, after an absence of three hours, a verdict of nine; and that in each case such a verdict should have the full force of a unanimous verdict. A bill of the same nature was laid on the table a year or two ago, by a young gentleman who sat on the left of Mr. M. C. Cameron in opposition. So daring an innovation, attempted under such auspices, of course came to no good end. Mr. Bethune's bill met with more respect, having been thrown out on the second reading, on an equal division in a full House.

THE Grand Jury did not escape without assault, any more than the Petit Jury. Mr. Currie brought in a bill to abolish grand juries altogether, much to the alarm of the House, which got rid of it with as little delay as possible. Grand juries are a terrible bugbear to law-reformers. Chief-Justice Harrison considers them an expensive nuisance, as his late address to the grand jury at the County of York Assizes, made manifest, and he cited Lords Brougham and Denman in support of his views. The destruction of grand juries was a favourite hobby of Lord-Chancellor Chelmsford, who made more than one ineffectual attempt to improve them out

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of existence. If they were only to be dispensed with in the cities, where competent magistrates are intrusted with the duty of committal, the question would be a simple one; but, as the rural districts are to be considered, it becomes complicated. We reprint elsewhere an article dealing with one of the evils of the system in England, which does not as yet exist here, but will when the Bill for payment of witnesses in criminal cases becomes law,—namely, the expense it adds to the cost of the administration of justice.

In the Clements case, a point arose which is of no little importance. Mr. Kenneth Mackenzie, Q.C., did not conduct the case for the Crown, because he expected to be called as a witness. When so called, he objected to being interrogated, on the ground that it was sought to elicit from him facts and statements which had come to his knowledge in his capacity of Crown Counsel. The statements which it was desired to put in evidence were made by the prisoner himself to Mr. Mackenzie, and related to the case against Davis, then in Mr. Mackenzie's hands. These statements the prisoner (Clements) sought to give in evidence on his own behalf. It appears to us, that there should have been no hesitation on the part of Mr. Mackenzie about disclosing them. The rule that governs in these matters, was concisely laid down by Lord Chief-Justice Eyre, in *Hardy's case*: "It is perfectly right," said the Lord Chief-Justice, "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that these persons who are the channel by means of which the detection is made, should not be unnecessarily disclosed." Now, it will be observed, that this rule is for the protec-

tion of the person who makes the communication. As in the case of other privileged communications, it may be waived by the person entitled to claim the protection. It seems to us, therefore, that when the person making the communication, a prisoner on trial for his life, invoked the disclosure for his own advantage, there need have been no delicacy in yielding to his desire. The Crown is surely not so wanting in tenderness for its subjects, as to insist upon such reticence on the part of its legal advisers.

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WHERE pleadings at length are allowed, as in Chancery proceedings, some practitioners have adopted the slovenly course (to put it in the mildest way) of copying out all documents referred to *verbatim*. This is an abuse of the proceedings of the Court, and no doubt very often proceeds from a desire to make costs. We observe that the same sort of procedure (more honoured in the breach than in the observance) was recently brought under the notice of the English judges. An affidavit of inordinate length (388 folios) was filed, wherein it was alleged that a number of irrelevant letters were set out at full length. An application was made to Malins, V. C., to take it off the file for that reason; and a case was mentioned, in which the Master of the Rolls had granted a similar application, wherein the affidavit contained 1,133 folios. The Vice-Chancellor refused the application on the ground that it was impossible for him to judge of the undue length or the relevancy of the affidavit without reading it and the pleadings. But he said that the judge who heard the cause would be able to dispose of these matters, and could deal with the

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question as the costs of such an affidavit. On appeal from this conclusion, it was upheld for the double reason that the matter was one resting in the discretion of the judge below, and that in substance the appeal related merely to a question of costs. In reference to the case before the Master of the Rolls, the Appellate Court observed that when the judge saw from the mere inspection of the affidavit itself, that it was a gross abuse of the proceedings of the Court, he was quite right in ordering it to be taken off the file; but otherwise, where the propriety of filing the affidavit could not be determined in that summary way: *Owen v. Emmens*, 20 Sol. J. 118.

The practice which has obtained in this Province is in conformity with the views expressed by the Vice-Chancellor Malins. We remember the late Chancellor Vankoughnet took much satisfaction in smiting one solicitor, who was famous for his circumlocutory and discursive style of pleading, by limiting the number of folios to be taxed for his effusions, when disposing of the cause at the hearing. It is very seldom, indeed, that a document needs be set out *in hæc verba*,—it should be the exception, and only when the peculiarity of the instrument is such, in case of fraud and the like, that *charta loquitur*. It is desirable to retain some system and some trace of art in our legal procedure, and this is one of the points to which attention should be given. It is enough generally to set out the material parts of the instrument. In all ordinary cases, where there is no doubt as to the legal effect, then only the legal effect of the instruments should be given.

It may be taken as a rule that the best pleaders at law, or in equity are those whose drafts are the most concise; they are those who apprehend the real issues of the case in hand, and present these issues in the most simple and effective form. No doubt there are pleaders who pursue

the policy of the cuttle-fish and envelope the controversy in an inky effusion of verbiage. But these are they, whose cause is bad to their own knowledge, or who are uncertain of their position, or who have but imperfectly mastered the weapons of their warfare. There is a tradition of a cautious old special pleader who systematically indulged in prolixity in difficult cases. Having achieved, once, an indictment for conspiracy which measured a foot or more in thickness as it lay rolled up, it was objected, "surely there must be some errors in a document like that." "No doubt," was the response, "but in these cases my plan is always to make the indictment so long that nobody can show it to be bad: either the defendant cannot find out the weak points, or he cannot be sure that there is not something somewhere else which will set them right."

The ancient Chancellors sometimes employed very ingenious methods to punish offenders of this sort. The records supply the details of a case where the counsel drew a monstrous replication of six score sheets of paper, whereas all the pertinent matter might have been contained in sixteen sheets. The Lord Keeper, Sir John Puckering, among other things ordered that the prolix pleader should be brought to Westminster Hall at ten in the morning, and that thereupon the warden of the fleet should cut a hole in the midst of the said engrossed replication, which was to be delivered unto him for that purpose, and put the said Richard's head through the said hole, and so let the said replication hang about his shoulders with the written side outward, and then, the same so hanging, should lead the said Richard bareheaded and barefaced round about Westminster Hall whilst the Courts were sitting, and should show him at the bar of the three Courts within the Hall: See Spence's Equitable Jurisdiction, vol. i. p. 376, note.

The most modern means of ensuring

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conciseness is to provide by Statute or rules of Court, short forms of pleadings for the most commonly recurring cases. This system has, in England, been carried to its utmost length by the Judicature Act; so much so that Mr. Justice Quain lately declared that brevity was the soul of pleading under the new rules. This is perhaps going to the opposite extreme, and the English legal journals are beginning to ridicule the exceeding curtness of the new system. We incline to think that the present methods of pleading in Equity in this Province are as sensible, and withal as formal, as are necessary to ensure the ends of justice. The bill, it is prescribed, is to contain a statement of the case in clear and concise language, and the answer is to consist of a clear and concise statement of such defences as the defendant desires to make. The judges of that Court have been careful to mould the procedure of the Court to suit the circumstances of the country, and have followed the advice of Lord Cottenham when he said, "I think it the duty of the Court to adapt its practice and course of proceeding to the existing state of society, and not, by too strict an adherence, to decline to administer justice": *Walworth v. Holt*, 4 M. & Cr. 635. It does not seem to us of much value to attempt to frame a set of forms for all sorts of pleadings and for all possible circumstances, unless the judges and law-makers have come to the conclusion that the functions of revising counsel are unnecessary, and that the system of pleading can be efficiently worked as a mere piece of machinery. Some reasonable latitude should be allowed for special or peculiar cases, and the power which the judges have, of disallowing or limiting the costs of unnecessary and verbose statements and pleadings will, as a rule, form a sufficient corrective to any abuse of the proceedings of the Court.

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The Commissioners for the revision and consolidation of the statutes affecting this Province, have made their second report.

The necessity for a speedy revision and consolidation of our statute law appears from the allusion the Commissioners make to the peculiar nature of our statute law, "consisting, as it does, in a great measure, of enactments passed under a constitution which no longer exists, and having application within a territory of which the present Province of Ontario forms only a part." We, therefore, cannot help expressing our regret that we are not to have a consolidation this year, but at the same time we are glad that the completeness of the work is not being impaired by undue haste and too little consideration.

The difficulties attending the present revision are, no doubt, exceptionally great, but experience tells us that a consolidation, at any time, is not compiled in a day, and as the work is one which will, under our present system, in all probability never be entered upon until the necessity for its completion is actually felt, it seems to us that some scheme should be devised by which consolidations might be prepared within a short space of time, and at comparatively short intervals.

A consolidation of the statutes does not mean merely the collecting of the *disjecta membra* into which the statutes have been torn by successive repeals and amendments. It incidentally involves a much greater responsibility—the reframing of many Acts or sections, in order artistically to introduce some amendment, or to bring a particular enactment into harmony with others; and if these incidental duties in the work of reconstruction are not performed with the greatest care, the

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consolidator may, by a stroke of the pen, become a legislator.

Amendments of the law are not always made by striking out certain words of an Act and substituting new ones. This style of amendment has its advantages; not much room is then left for judicial interpretation beyond the grammatical construction of sentences, and the amending Act becomes a part of the previous enactment. Most new provisions, however, cannot be introduced in this manner. When a leading principle of an Act is invaded, the amendment must generally be embodied in a substantive enactment. A new principle thus introduced may have the effect of modifying, not only the entire Act which is the immediate object of the amendment, but it may be also that provisions contained in other Acts are in effect repealed or modified. All of these provisions may not be individually present to the mind of the legislator, satisfied of the correctness of the new principle, and of the expediency of giving it universal effect; but, by the consolidator every remote application of the principle must be kept in view, and the requisite modifications of language made, in accordance with what appears to him to be the true legal effect of the amending Act. Before any consolidation takes place, however, every reader of the statutes must take the words before him in connection with what, to his mind, appears to be the legal effect of the amending Act, and notwithstanding that "*quot homines tot sententiae*," the minds of all Her Majesty's subjects must, by a pleasant fiction of the law, be made up in the same way.

In order partially to remove this source of doubt upon the construction of the statute law, a bill was introduced in the Legislative Assembly of this Province, in 1873, by Mr. McLeod, M.P.P. for West Durham, to provide that every amending statute should re-enact the whole law

upon the subject dealt with. This proposition, in the general form in which it was presented, was considered impracticable, and apparently with reason, but it seems to us that some modification of it would meet with the acceptance of the public, and greatly facilitate a knowledge of the law. For instance, all amendments to a particular Act might be required to be introduced into it by definite verbal alterations or by substantive sections, numbered as parts of the Act amended and introduced in their proper place in the original Act, wherever this course was practicable. (See 27-28 Vict., cap. 27.)

If this were done any person who, after each session, went through the process known as "booking up" his statutes, would be in possession of the Legislature's own wording of each section. It is the constant practice, however, of our Legislatures to amend an Act by passing a new one, covering much of the same ground as a previous Act, and extending or modifying without expressly referring to the previous Act. The effect of such legislation is, of course, to repeal so much of the prior Act as is inconsistent with the later one, and a clause to that effect is sometimes unnecessarily inserted; but the draftsman must have known what provisions it was intended to repeal, and an express statement of those provisions might easily have been given. This not having been done, however, a minute examination of the prior Act becomes necessary, and a decision as to what remains unrepealed is with difficulty, and seldom with certainty, arrived at. The various Acts respecting Municipal Institutions, for instance, although twice consolidated since 1859, have never been repealed, except in this uncertain manner, and portions of the consolidation of 1859, not contained in or inconsistent with the later Acts, may still be in force.

A form of repealing clause is sometimes employed, which intensifies the difficulty

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by repealing so much of a prior Act as makes provision "in any matter provided for" by a later one: see for example the Patent Act, 35 Vict., cap. 26, sec. 52 (D). Here, it has to be borne in mind, that if the "matter" (an indefinite term) in respect to which provision is made by A. is provided for by B., the latter effects a repeal of A., although possibly both might well stand together.

The Act respecting certain separate rights of property of married women (Con. Stat. U. C., cap. 73), is not in any way expressly referred to in the Act to extend the rights of property of married women (35 Vict., cap. 16). The effect of the latter Act, however, is to modify in many particulars Con. Stat., cap 73, but to what extent can only be conjectured until ascertained by a judicial decision upon each of the numerous points involved. Other examples might be given: *e. g.* :—The Mechanics' Lien Acts of 1873 and 1875, 36 Vict., cap. 27, and 38 Vict., cap. 20. Years might elapse before the exact state of the law could be certainly known, but upon the consolidation of these Acts, all such questions have to be solved at once by the consolidators, upon a view merely of statute in juxtaposition with statute, with no parties before them actually interested in a decision one way or the other, without hearing the argument of counsel, and without any of the other circumstances which, in the case of a judicial decision, assist so materially in arriving at a correct conclusion by means of the thorough investigation of all sides of a question.

It is such matters as these that will make the work of the Commissioners so arduous, and their responsibility so great; but if the Legislature, when amending the law, were only to be at the pains of pointing out in the manner suggested, with some degree of exactitude, the effect which the amendment is intended to have upon the pre-

existing law, the statutes would only require consolidation for the sake of convenience of form. Each Act would always be in as definite a form as any statute is capable of assuming, and the work of consolidation might be performed with little trouble or expense, and within a very short space of time, by the Law Clerk or other departmental officer.

Even if this work were not confided to the Law Clerk, it seems to us that his department might, in addition to its present duties, be required to perform others which would, by increasing the information of the House, tend to a more intelligent consideration of the measures brought before it, as well as insure more simplicity and uniformity in the style of its enactments.

The English Statute Commissioners, in their supplementary report, in 1856, gave the outlines of a scheme for a similar object, and recommended "the appointment of an officer or Board, with a sufficient staff of legal assistants, whose duty it should be to advise on the legal effect of every bill which either House of Parliament should think fit to refer to them; and, in particular, on the existing state of the law affected by the bill, its language and structure, and its operation on the existing law; and also to point out what statutes it repeals, alters, or modifies, and whether any statutes, or clauses of statutes on the same subject matter are left unrepealed or conflicting, so that the House may have at its command the materials which will enable it to deal properly with the bill." The report proceeds: "The powers of both Houses, and of all members of each House, would remain inviolate; but assistance would be provided for them, as well in advising on the effect of bills at the time of their introduction, as in watching them in their progress through Parliament, and keeping them in harmony with the whole law. The labour and anxiety

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of all members of Parliament would thus be materially relieved, and the legislation of the country improved. A great saving of time would also be effected, and discussions which now arise, and amendments which it is now necessary to, introduce in the various stages of the bill, would often be avoided."

Of course, it would not be proper to shift upon a person having no voice in the legislation the responsibility which the Legislature or the government of the day must assume, of seeing that the legislation is within the legislative powers of the Legislature, and does not interfere with the pre-existing law beyond what is the intention of the measure or the requirements of the public. The attempt to place a great degree of responsibility upon such a Board or officer, with regard to the supervision of bills passing through Parliament and the consequent difficulty of defining this responsibility without rendering the Legislature subordinate to such officer or Board, seem to have been the main reasons why the suggestion of the Statute Commissioners was never adopted, although it met with very general approval. With us the same reasoning would, of course, be applicable against the delegation by the Legislature of any of its functions. Still, as we have said, the usefulness of the Law Clerk's department would, it seems to us, be very much increased if it were converted into a department of easy access, to which reference might at any time be made as to the state of the statute law on any subject, so far as it appears upon the face of the statute book, or has been further ascertained by judicial decision.

The modification required in the present department would be slight. The main duties to be performed would be:—

1. To keep a record of the effect of every Act upon preceding Acts, and the law generally.

2. To keep a record of all judicial

decisions or comments, placing a construction upon, and pointing out ambiguities of the statutes, or suggesting amendments of the law. By such means defective legislation, such as we referred to in our last number, and have in many previous numbers called attention to, would be at once discovered, and might be speedily remedied.

3. The duties of the department should also properly extend to the preventing the occurrence of such errors, by the revision of bills as to matters of substance, as well as of form, while they are passing through their various stages in the House.

A great champion of legal reform in England, Lord Westbury, in the course of one of his greatest speeches on the subject, in the House of Lords, said: "You have no persons to assist you who are trained or educated in the great work of legislative composition. But legislative composition is one of the most difficult things that can be conceived. When you address yourselves to a new statute without having considered the general principle of the proposed measure, the bill is subjected to the process of Committee, and there it constantly happens that things are grafted upon a statute under mis-conception and at variance altogether from the original conception of the framer. Your new Acts are patches on an old garment. You provide for the emergency, but you pay not the least regard to the question whether the piece you put into the old garment suits it or not."

Instances of this in our statutes are innumerable, but might often be avoided, if there were a department or an officer to whom committees or individual members might, while a bill is passing through the House, refer for advice and assistance, with regard not only to the substance of the bill but also to its form and phraseology.

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4. The clerical correctness of the Acts in their final shape, should also be attended to by the department; as well as the preparation of an index, which would show something more than the titles of the various Acts.

The title of an Act affords, not unfrequently, very little indication as to its contents. A person unskilled in the present mode of entitling and indexing Acts would pass over "*An Act respecting the operation of the Statutes*," 38 Vict., c. 4, (O), in a search for the procedure in cases of summary convictions before Justices of the Peace, and in looking for 36 Vict., c. 50, (D), which alters the punishment annexed to the crime of rape, would probably turn last, if at all, to the word "Offences" in the index. The index to the old Consolidated Statutes is probably the worst that mortal man ever conceived; but the Secretary of the Commission, and not a departmental officer, was, we believe, responsible for that.

The prolixity of statutes is an ancient grievance. Centuries ago Edward VI expressed a wish that "the superfluous and tedious statutes might be brought into one sum together and made more plain and short to the intent that men might better understand them." Lord Coke in no less severe terms says, in the preface to part 2nd of his reports, that a large proportion of the difficult points which come before the courts arise "upon Acts of Parliament overladen with provisos and additions, and many times on a sudden, penned or corrected by men of none or very little judgment in law." And again: "If Acts of Parliament were, after the old fashion penned, and by such only as perfectly knew what the Common Law was before the making of any Act of Parliament concerning that matter, as also how far forth former Statutes had provided remedy for former mischiefs and defects discovered by experience, then

should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace by construction of law between insensible and disagreeing words, sentences and provisos, as they now do." Of late years these evils have, in this country, been to a great extent removed, and men draw their acts more nearly in the language in which they write their letters; and if occasionally we light upon an Act couched in the phraseology miscalled "parliamentary shorthand" we may be sure that it is the work of an unprofessional hand, while the tersest and clearest Acts will invariably be found to have been drawn by a professional man who sees no virtue in a multitude of "whereases," "aforesaid" or "notwithstandings."

The advantage of simplicity and uniformity in the law, can not be over-estimated, and the influence of such a department as we have endeavoured to describe in the direction of formal propriety in our statute book, would be very great. Again all must concede that if a clear and compendious statement of the law were always at hand, litigation would be less frequent, decisions more speedily given, jurisdiction more readily entrusted to local and inferior tribunals, and the expense of obtaining justice diminished. A succinct body of the statute law, which we have endeavoured to show might, by some such scheme as the one suggested, be constantly published, would very materially conduce to these most desirable results, while it would form a round in the long ladder to that legal millennium, the Age of an English Code.

THE following is the report of the Commissioners, as presented to His Honour the Lieutenant-Governor:

The Commissioners appointed for the Consolidation and Revision of the Statutes affecting the

CONSOLIDATION OF THE STATUTES.—REPORT OF COMMISSIONERS.

Province of Ontario have the honour to report as follows :—

We regret to have to report that it has been found impossible to complete a draft of the whole of the work entrusted to us in time to enable your Honour to submit it to the Legislative Assembly at its present Session.

Apart from the special difficulties which attend the work, and which were alluded to in our previous Report, the body of Statutes to be examined has proved larger, and the labour of arrangement and revision greater than we anticipated.

We have, however, considerable progress to report.

At the date of our previous Report we had only completed the necessary preliminary examination of the Statutes. Since that date the actual work of consolidating the Acts within the legislative authority of the Legislature of Ontario has been continuously proceeded with ; all those Acts have been digested and arranged in manuscript under appropriate titles, and are now undergoing a thorough revision while passing through the press. A copy of the printed draft, so far as completed, accompanies the present Report.

The Statutes of the late Province of Canada not within the legislative authority of the Provincial Legislature, together with the Statutes of the Dominion Parliament affecting Ontario, have been classified according to their subjects, and about a third part of these has been printed, with the addition of notes indicating, as far as possible, the effect upon each Act of subsequent legislation, and with such other annotations as appeared to conduce most to convenience of reference.

Such of the Imperial Acts affecting Ontario as it was considered advantageous to print, have been collected, and printed in chronological order, and, will be submitted to your Honour.

In the course of the revision of the Acts within the authority of the Provincial Legislature, a large number of incongruities have presented themselves. Many of these are due to the peculiar nature of the Statute law affecting this Province, consisting as it does in a great measure of enactments passed under a constitution which no longer exists, and having application within a territory of which the present Province of Ontario forms only a part.

We have considered that the scope of our authority justified us in altering the form of most of these enactments so as to bring them into harmony with the new constitution of the Province or the plain intention of the Legisla-

ture. Some of them, however, which we did not consider ourselves authorized to deal with without the assistance of legislation, are mentioned in the subjoined schedule, together with some amendments which have suggested themselves.

When the work of revision is further advanced, we may be able to suggest other amendments, and possibly of a more substantial character ; but it has been deemed inadvisable to hurry through the press a work of so much importance without weighing more carefully than we have yet done many of the numerous questions involved, and considering the direction in which amendments might be made with advantage.

One other matter appears to us to require a few remarks.

Provisions trenching upon, if not wholly within, the subject of "Criminal Law," are, of course, to be found in many of the Acts of the late Province of Canada, which are in other respects within the exclusive legislative powers of the Provincial Legislature, and therefore have reference to matters with which the Dominion Parliament could not be called upon to deal. The provisions referred to are designed to carry the particular Act into effectual execution. The natural place for such provisions would therefore be in the Act which they are to assist in carrying out, but if they were so placed, some auxiliary legislation by the Dominion would then be required.

In the present only partially completed state of the work of revision, we are not in a position to lay before your Honour a complete list of such provisions, and to furnish one or two instances would answer no useful purpose. In view, however, of the desirability of defining sharply the line between the subjects for legislation by the Dominion and the Province respectively, we would recommend, if application is made to the Dominion Parliament, that it be for such legislation as will tend to separate once for all the enactments now in force in this Province according to the distribution made by the British North America Act of the legislative powers, and to exclude from the Provincial Statute Book all provisions which would be in form enactments of the Provincial Legislature, but would owe their legal validity to a confirmatory enactment of the Dominion Parliament.

LAW SOCIETY RESUME.

LAW SOCIETY.

MICHAELMAS TERM, 1875.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority :—

Monday, 18th November.

The several gentlemen whose names appear in the usual lists were called to the Bar and received certificates of fitness.

The Secretary was directed to give notice for the last Friday of this Term of the election of two Benchers to fill the vacancies created by the elevation to the Bench of R. A. Harrison, Esq., Q.C., and of Thomas Moss, Esq., Q.C.

Tuesday, 16th November.

The abstract of balance sheet for the third quarter of 1875 was laid on the table.

The Treasurer reported that the Government had paid off four thousand dollars of Canada debentures, six per cent. held by the Society, and that the amount had been placed on special deposit at the Bank of Toronto at 5 per cent.

Ordered, that the sum placed on special deposit be increased to twenty thousand dollars.

The Report of the Examining Committee was received and adopted.

Ordered, that Mr. Rordans be paid the sum of one hundred dollars as a subscription to the new edition of his Law List, and that twelve copies be taken for the library, the subscription to be paid when the work is completed.

The Report of the Legal Education Committee was adopted.

Resolved, that the petition and bill reported by the Special Committee for the admission of barristers and attorneys, and the establishment of a benevolent fund, and the amendment of the law relating to the election of Benchers be adopted, and that the same be entrusted

to Mr. Hodgins to present to the Legislature.

Ordered, that Mr. Evans be paid the usual fee of fifty dollars as Examiner for this term, and be appointed Examiner for next term.

Resolved, that Mr. Berthon be employed to paint a portrait of Chief Justice Harrison in the usual form, and also a half-length picture of Mr. Treasurer.

Saturday, 20th November.

Mr. Britton took his seat as a Bencher.

The Examining Committee for next term were appointed.

Mr. Irving was appointed a member of the Library Committee in place of Mr. Harrison.

A letter received from C. Robinson, Esq., Q.C., Editor-in-chief of the Reports, was ordered to be transmitted to J. D. Armour, Esq., Q.C., to be reported on on the last Friday of this term.

A communication received from J. J. Kingsmill, Esq., County Judge of Bruce and Chairman of the Trustees of the Local Law Library, for a gift or loan of books for the Library, was referred to the Committee.

Friday, 3rd December.

A Special Committee, consisting of Messrs. Armour, Hodgins and McCarthy, was appointed to consider the subject of the reports and reporting, the report of such Committee to be considered in Convocation on the last Tuesday in December, copies having been previously sent to each Bencher.

A communication from Mr. O'Brien, submitted by Mr. Armour, was referred to the same Committee.

Hector Cameron, Esq., Q.C., was elected a Bencher in the place of the Hon. the Chief Justice of Ontario.

F. Osler, Esq., was elected a Bencher in the place of Mr. Justice Moss.

The report of the Legal Education

ACTS OF THE PRESENT SESSION.

Committee on the appointment of Lecturers was received and to be considered on the last Tuesday in December.

The Treasurer reported the result of the Scholarship Examination.

The Treasurer was requested to communicate with the Lecturers on the subject of their positions as Lecturers after the first of January, 1876.

The report of the Library Committee was received and adopted.

The petition of Mr. Locke was granted.

The petition of Mr. A. R. Lewis was refused.

Mr. J. C. Cooper was granted a fortnight's leave of absence and a gratuity of twenty-five dollars.

Mr. Martin gave notice, for the 28th inst., of a motion that the report of the Legal Education Committee shall apply to the Reporters as well as the Lecturers.

Resolved, that the thanks of the Convocation be given to Mr. Molloy for his presentation of autographs of distinguished statesmen to the Law Society, and for the interesting and instructive address with which he accompanied the presentation.

The petition of Mr. Mahaffy was granted.

Mr. Sinclair gave notice, for the 28th instant, of a motion on the subject of amendments of Administration of Justice Act.

Messrs. Hector Cameron and Osler were appointed to act on Committees of which Messrs. Harrison and Moss were respectively members.

Tuesday, 28th December.

The petition of Mr. J. A. Morton was granted.

The Secretary was directed to send a copy of the letter received from the Chairman of the Finance Committee on the subject of the drainage of the Hall to the Public Works Department.

The reports of the Special Committee

on Reporting were presented by the Chairman, J. D. Armour, Esq., Q.C.

The report on stenographic reporting was adopted and the Special Committee reappointed to communicate with the Attorney-General on the subject, with full power to accept any arrangement proposed by the Government, with which they shall be satisfied unanimously.

The further consideration of the report of the Committee on General Reporting postponed until next term.

Resolved, that the present Examiners be continued until next Trinity Term, and that the report of the Legal Education Committee, as to advertising for applications when vacancies occur in the office of Examiner, be adopted and extended also to applications for the office of Reporter.

Ordered, that the sum of thirty dollars be paid on the order of Thos. Hodgins, Esq., to the Short-hand Reporters Association.

ACTS OF THE PRESENT ONTARIO LEGISLATURE.

The following Acts of the present session will be in force shortly, and will be of interest to our readers.

An Act to amend the Law of Vendor and Purchaser, and to simplify Titles.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. In the completion of any contract of sale of land made after the passing of this Act, the rights and obligations of vendors shall be regulated by the following rules (but subject to any stipulation in such contracts to the contrary), namely:—

First. Recitals, statements, and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they

ACTS OF THE PRESENT ONTARIO LEGISLATURE.

shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

Second. Registered memorials of discharged mortgages shall be sufficient evidence of the mortgages without the production of the mortgages themselves, unless and except so far as such memorials shall be proved to be inaccurate; and the vendor shall not be bound to produce the mortgages unless they appear to be in his possession or power.

Third. In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, or, in other cases, if possession has been consistent with the registered title, the memorials shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials shall be proved to be inaccurate; the vendor shall not be bound to produce the original instruments unless they appear to be in his possession or power, and the memorials shall be presumed to contain all the material contents of the instruments to which they relate.

Fourth. Where a registered deed of conveyance acknowledges payment of the consideration money, such acknowledgment shall be sufficient evidence of payment except so far as such acknowledgment shall be proved to be inaccurate.

Fifth. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

2. Trustees, who are either vendors or purchasers, may sell or buy without excluding the application of the first section of this Act.

3. A vendor or purchaser of real or leasehold estate in Ontario, or their representatives respectively, may at any time or times, and from time to time apply in a summary way to the Court of Chancery, or a judge thereof, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the exist-

ence or validity of the contract); and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incidental to the application shall be borne and paid.

4. In proceedings in Chancery to quiet a title it shall not be necessary to produce any evidence which, by the first section of this Act, is dispensed with as between vendor and purchaser, nor to produce or account for the originals of any registered deeds, documents or instruments, unless where the officer or judge before whom the investigation is had shall otherwise direct.

5. Upon the death of a bare trustee of any corporeal or incorporeal hereditament, of which such trustee was seized in fee simple, such hereditaments shall vest in the legal personal representative, from time to time, of such trustee.

6. Where any freehold hereditament shall be vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole*, and without her husband joining in the conveyance.

7. In suits at law or in equity, it shall not be necessary to produce any evidence which, by the first section of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *prima facie* sufficient for the purposes of such suits.

An Act to amend the Law respecting the Law Society.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The Benchers of the Law Society may from time to time make all necessary rules, regulations, and by-laws, and dispense therewith from time to time, to meet the special circumstances of any special case respecting the admission of students of law, the periods and conditions of study, the call or admission of barristers to practice the law, and all other matters relating to the interior discipline and honour of the members of the Bar.

ACTS OF THE PRESENT LEGISLATURE—GRAND JURIES.

2. The said Benchers of the Law Society from time to time may also make all necessary rules, regulations, and by-laws and dispense therewith from time to time, to meet the special circumstances of any special case respecting the service of articled clerks, the period and conditions of such service, and the admission of attorneys or solicitors to practice in the Courts, and all other matters relating to the interior discipline and practice of such attorneys, solicitors, and articled clerks.

3. It shall not be necessary for any attorney or solicitor to obtain from the Clerks of the Courts of Queen's Bench, or Common Pleas, or Registrar in Chancery, certificates to practise as such attorneys or solicitors, but such certificates shall hereafter be issued by the Secretary of the Law Society, under the seal of the said Society, according to the list of names appearing in the copy of the roll of attorneys and solicitors of the respective Courts, certified to the said Secretary by the Clerks of the Crown and Pleas and Registrar in Chancery, under section fifty of chapter thirty-five of the Consolidated Statutes for Upper Canada; and the said Law Society shall determine what fees shall be payable for such certificates, and the certificates so issued shall be, and shall be construed to be, the certificates heretofore authorized by law.

4. The said Benchers of the Law Society may, by by-law, establish a fund for the benefit of the widows and orphans of barristers, attorneys, and solicitors, and of persons who have been such, to be called the Law Benevolent Fund, and may make all necessary rules and regulations for the management and investment of the said fund, and the terms of subscription and appropriation thereof, and the conditions under which the widows and orphans of such persons shall be entitled to share in the said fund.

5. The sixth section of the Act passed in the session held in the twenty-ninth and thirtieth years of the reign of Her present Majesty, chaptered forty-nine, entitled, "An Act to amend the Act respecting Attorneys-at-Law," is hereby amended by inserting, after the words "Common Pleas" in the second line of said section, the words "or in the County Courts."

6. All inconsistent enactments are hereby repealed, but nothing in this Act shall interfere with the present practice of the Courts as to the admission of attorneys or solicitors, nor with their jurisdiction over them as officers of such Courts.

7. The said Benchers of the Law Society may appoint such officers and servants as may be necessary, for the management of the business of the said Law Society.

8. The Attorney-General of Canada for the time being and every person who shall have held that office, if a member of the Bar of Ontario, shall be *ex-officio* a Benchers of the said Law Society.

9. Whereas, certain petitions have been presented to the Legislature of this Province during its present session, praying for special Acts of Parliament for the admission of the petitioners to practice as barristers or attorneys and solicitors, Be it enacted that it may and shall be lawful for the said Law Society in their discretion, upon payment of the usual fees therefor, to call to the Bar as barristers, or admit to practice as attorneys and solicitors, such of the said petitioners as have so petitioned, upon proper proof of the allegations in said petitions and upon their passing the usual final examination prescribed by the rules of the said Law Society for barristers or attorneys and solicitors, provided they come within the classes of cases in which the Legislature of this Province has heretofore authorized, by special Acts of Parliament, the admission of barristers, or attorneys and solicitors.

SELECTIONS.

GRAND JURIES AND THE PLEAS OF CRIMINALS.

THE cost of prosecuting and punishing those idle and dissolute members of the community who make up the criminal classes is a large item in our national expenditure; and the loss and inconvenience which they inflict upon individuals who are called upon to give evidence in prosecutions against them are considerable. Anything, therefore, which is capable of diminishing one or more of the evils in

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question is well worthy of attention. And, since we are satisfied that the administration of our criminal law at Assizes and Sessions can be made less expensive to the State, more convenient to witnesses and others engaged in prosecutions, and more effective for the conviction of criminals, by means of certain simple changes of procedure, we do not hesitate to submit our ideas on the subject for the consideration of our readers. Some of them are doubtless well acquainted with the administration of our criminal law in all its details; while others have only that general information on the subject which can be picked up by serving on juries, giving evidence in trials, or watching proceedings in the courts. It is probable, however, that the attention of few of them has been directed to the various steps by which criminals are brought to justice, with special reference to their bearing upon the convenience of persons concerned as witnesses, and upon the amount of this branch of our national expenditure. We shall, therefore, describe such of them as directly affect the question before us; and, in doing so, we shall restrict ourselves to a description of what takes place generally, and shall not trouble our readers with an account of criminal law procedure in exceptional cases.

When a man is accused of a crime, he is taken before a magistrate, who hears the evidence against him, and then, according to circumstances, either dismisses the case, deals with it himself, or commits the prisoner for trial at some assizes or sessions which will shortly be held in the neighbourhood. When a prisoner is so committed, the evidence against him is taken down in writing; the written reports of their evidence are read over to the witnesses, and the papers are duly signed by them and by the committing magistrate, and are sent to the assizes or sessions at which the trial is to take place. These written reports of the evidence given on the committals of prisoners are called "depositions," and we shall have occasion to refer to them again. When the day has arrived on which the trials of prisoners at the Assizes or Sessions are to begin, the Grand Jury appear in Court and receive their charge, in which any cases likely to present difficulties are usually mentioned, and in which information and advice are given as to the proper

method of dealing with them. At assizes the charge is given by the judge who presides in the Crown Court; at county sessions, it is given by the chairman of the magistrates; and at city or borough sessions, by the Recorder. When the Grand Jury have been charged, they retire to the room set apart for their use, and begin to consider the Bills preferred against the prisoners who have been committed for trial at the assizes or sessions at which they are acting. It is their duty to examine the Bill against each prisoner, and to determine whether there is a *prima facie* case against him, which he should be called upon to answer. To enable them to do this, they have power to call and to examine the witnesses who are in readiness to give evidence in support of the charge.

The prisoners cannot be called upon to plead, until true Bills have been found against them; and the court is, therefore, obliged to wait until some Bills have been found before it can proceed with the trials. When a batch of true Bills has been brought into court by the Grand Jury, the prisoners against whom they have been found are arraigned; the charges against them are read over, and they are called upon to plead.

Those of them who plead guilty are, if they are old offenders, then called upon to plead to counts of the indictments which charge previous convictions. And if a prisoner, against whom this charge is made, deny that he has been previously convicted as alleged, the jury are sworn to try the question; the necessary documentary evidence of the conviction is produced, and a warder from the prison where he was confined pursuant to it, usually gives evidence of his identity, which is considered conclusive by them. When the pleas have been taken, those prisoners who have pleaded guilty are brought forward and sentenced; and the witnesses, who have held themselves in readiness to give evidence against them, are paid, and allowed to go to their homes.

The prisoners who have pleaded not guilty to the principal charges are then tried in their proper order; and those of them who are convicted, and against whom previous convictions are charged in the indictments, are then called upon to plead to the counts containing the charges in question. If any of them deny that

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they have been previously convicted, the question is tried, as in the case of those who took the same course after pleading guilty to the principal charges. As each prisoner is convicted, he is sentenced, and the witnesses against him are paid and allowed to go away.

We have now given a short account of the procedure in our Criminal Courts, which will be sufficient to enable our readers to understand the suggestions for its amendment which we wish to submit to them. It will be observed that the Grand Jury begin their deliberations on the first day of the Assizes or Sessions at which the prisoners, against whom they find true Bills, are to be tried; and that they have power to call and to examine witnesses.

It will also be observed, that when they have brought in a true Bill against any prisoner, he may be called to plead, and may be put upon his trial at once. As a general rule, Grand Juries only call some of the witnesses in support of each Bill before them; and, in cases in which true Bills are found, and the prisoners plead guilty to the charges against them, none of the witnesses are called; unless special circumstances make the presiding judge, recorder, or magistrate, desire to question them before passing sentence. Our present procedure, however, compels the persons in charge of prosecutions to bring all the witnesses, against each of the prisoners in the calendar, to the town at which the assizes or sessions are held, on the earliest day on which the Bills in support of which they may be called upon to appear can be taken up by the Grand Jury. It also obliges them to keep them there, and to have them in readiness to give evidence, from that time, till the cases in which they are concerned are finally disposed of. All these witnesses are paid so much a day during the time they are in attendance; and their travelling expenses, if any, are also repaid to them. The money thus disbursed is, in the first instance, paid by the county treasurers, in respect of witnesses appearing at assizes and county sessions; and by the city or borough treasurers, in respect of witnesses appearing at city and borough sessions. It is, however, ultimately repaid to these local treasurers by the Treasury, out of the Consolidated Fund.

It is clear that the procedure which we

have described is both extravagantly wasteful of public money, and unnecessarily inconvenient to individuals who have the misfortune to be summoned as witnesses in criminal cases. Private citizens are brought away from their ordinary occupations, and are kept in forced idleness about our criminal courts, and, after being subjected to great inconvenience and loss, are frequently told they are at liberty to go home, as their evidence will not be required, the prisoners against whom they were ready to appear having pleaded guilty. Warders of prisoners are often brought from distant parts of the country to be in readiness to give evidence as to previous convictions, which all persons, who are acquainted with proceedings in our criminal courts know perfectly well are generally admitted, almost as a matter of course, by the prisoners against whom they are charged. These public servants are brought to the towns where our assizes and sessions are held at great expense to the State. The indirect loss occasioned by our present procedure is also considerable; for the warders in question are withdrawn from the discharge of their regular duties, and are sometimes kept loitering about our courts for two or three days. The mere fact that our present procedure compels persons in charge of prosecutions to bring witnesses against prisoners who plead *guilty*, as well as against those who plead *not guilty*, and are consequently tried, should be sufficient to cause us to review the administration of our Criminal Law, in order to see whether it may not be made more convenient to individuals, and less expensive to the State.

We shall now enter into the details of a proposed procedure under which the attendance of witnesses in the cases in which prisoners pleaded *guilty* would be, generally, unnecessary; while the efficiency of the administration of our Criminal Law would, at the same time, be increased. The power of Grand Juries to call and to examine witnesses in support of the Bills before them, and our practice of taking the pleas of criminals, *after* the commencement of the assizes or sessions at which they are to be tried, are the joint causes of the expenditure of public money which we consider unnecessary and wasteful, and of the other evils which we desire to remedy. These, therefore, are the points

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to which we must direct our attention; and it is evident that if we would effect the saving contemplated, and remedy the evils in question, we must alter our practice with respect to Grand Juries and with respect to the time of taking pleas.

We must either abolish Grand Juries, or deprive them of the power of calling and examining witnesses.

And we must call upon our criminals to plead a day or two before the commencement of the assizes or sessions at which they are to be tried; and we must then summon those witnesses only whose attendance is absolutely necessary, namely, the witnesses against those prisoners who plead *not guilty*, and who consequently have to be tried. Can we make the changes indicated, without being unduly harsh to our criminals, and without weakening the efficiency of the administration of our Criminal Law? We think we can, and we think the necessary changes of procedure can be made easily.

We will first consider the change which should be made with respect to Grand Juries. The Grand Jury is a very ancient institution. Its primitive constitution is described in the laws of King Ethelred II.* (A.D. 978-1016); and, we believe, English gentlemen have periodically met together as Grand Jurymen from that time to the present. We will not hesitate to confess that we are in favour of the abolition of Grand Juries. We think it prudent, however, to make their abolition an alternative proposition; for we know that some people have great veneration for them, and consider them bulwarks of our liberties.

In days when our judges were creatures of the Crown, and jurymen were ignorant, and, in cases in which it was a party, were liable to be punished if they gave honest verdicts, Grand Juries were, no doubt, great safe guards to the people. There was some chance that the collective

wisdom and independence of the gentlemen who were summoned on them, would protect the liberty of the subject, and prevent the strong from oppressing the weak.

Grand Juries have, no doubt, done good service in the past, and we will not venture to say that they are absolutely useless now. We think, however, that they have ceased to be necessary; that they sometimes cause a failure of justice; and that they may be abolished without danger to the liberties of the people.

Our judges, recorders and chairmen of magistrates at Quarter Sessions, are no longer under the influence of the Crown; and though our judges still, nominally, sit as its representatives, in reality they sit as representatives of the Nation, to preside over the administration of justice on behalf of the people at large.

They carefully consider the evidence against each of the prisoners tried before them, and, if any case is not made out by the prosecution, they declare that there is no evidence to go to the jury, and direct an acquittal. If, therefore, Grand Juries were abolished, all the protection which is fairly due to prisoners who are innocent of the charges made against them, would be given by the judges, recorders, and chairmen of magistrates who preside at Assizes and Sessions. In such cases, they would direct acquittals, and since they would do this after all the evidence had been given in open court, we think justice would be less likely to fail than it is at present, when bills are thrown out by grand jurymen, who have not generally had any legal training, and who have not the same facilities for sifting the evidence adduced.

It is also worthy of consideration, that common jurymen are now better educated than grand jurymen were a few centuries ago; and that our free and vigilant press, and our parliamentary government, make oppression, under cover of criminal proceedings, almost an impossibility. We think, therefore, that the services of Grand Juries might safely be dispensed with, and that their abolition would be advantageous to the State. If, however, the people will not submit to their abolition, we can retain them, and still effect the objects we have in view.

We have seen that the only duty which

* "This is the ordinance which King Ethelred and his Witan ordained as 'frith-bot' for the whole nation, at Woodstock, in the land of the Mercians, according to the law of the English." III. cap. 3. . . . "And that a gemot be held in every wapontake; and the xii. senior thegns go out, and the reeve with them, and swear on the relic which is given them in hand, that they will accuse no innocent man, nor conceal any guilty one."—*Thorpe's Ancient Laws and Institutes of the Anglo-Saxons.*

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they have to perform, with respect to prisoners, is to ascertain whether there are *prima facie* cases against them, which they should be called upon to answer. It is clear, that all the information which is necessary to enable them to do this can generally be obtained by reading the depositions. Sometimes, however, additional evidence turns up after a prisoner has been committed for trial. In such cases, the additional evidence in question might be taken by a magistrate in the presence of the prisoner, and might be committed to writing, duly signed by the witness and by the magistrate who took it, and attached to the depositions. If this were done Grand Juries would, in all cases, be able to obtain the information which they required, by reading the depositions and the additional evidence, if any, attached to them, together with any documents referred to. We are aware that depositions are not always taken as carefully as they ought to be. There is no reason, however, why they should not be carefully and accurately taken in all cases. We know that it is the duty of the officials concerned to do so, and we cannot admit the fact that a few of them discharge the duty in question in a careless and slovenly manner, as an argument of any weight against the change of procedure which we propose.

Moreover, short-hand writing has now been brought to such perfection, that any possible objection, based upon the inaccuracy of depositions, can easily be surmounted by providing that they shall contain verbatim reports of the evidence given on the committals of prisoners. This would necessitate some simple changes of procedure before the committing magistrates, into the details of which we shall not enter here. It would also cause some extra expense. We do not, however, think this method of taking depositions would be at all necessary; but even if it were, we have no doubt that, after paying the extra expense in question, the State would still be a considerable gainer by changes which we recommend.

We think, therefore, if Grand Juries are not abolished, they should be deprived of the power of calling and examining witnesses, and should be restricted to the consideration of the depositions and other documents, if any, which we have mentioned. In addition to the saving of

public money which we contemplate, we think the change of procedure proposed would, in some cases, prevent a failure of justice. The depositions are taken when the facts sworn to by the witnesses are fresh in their memories, and before the friends of the prisoners have had time to tamper with them. Witnesses who have been tampered with sometimes try to twist their evidence in favour of prisoners, even when it is given in open Court, and is brought out by the questions of counsel whose intellects have been specially trained for the work. Such witnesses are much more likely to attempt to twist their evidence, and to succeed in giving false impressions, when they are examined in grand jury rooms, and have only the untrained intellects of grand jurymen to contend with.

Now, if we either abolish grand juries or restrict them to the consideration of the written evidence bearing upon the cases before them, we can easily avoid the necessity, which now exists, for summoning the witnesses against prisoners who plead *guilty*. In order to do this, we must appoint Commissioners, to receive the pleas of prisoners a day or two before the commencement of the Assizes or Sessions at which they are to be tried. If we abolish Grand Juries, the indictments must be made by virtue of the committals. And if the pleas of prisoners to be tried at Assizes be taken on the Commission. Day, there will be time enough to summon the witnesses whose attendance is required. If we retain them, they will have to be charged, and, we think, the Commissioners in question might either be allowed to give the charges themselves, or might read charges which had been written, after reviewing the depositions by the judges, recorders, or chairmen of magistrates, who would preside at the trials. These Commissioners should sit in open Court, and should cause the prisoners to be brought forward and called upon to plead to the principal charges. They should then sit with closed doors to take the pleas to the counts charging previous convictions. They should have power to advise prisoners to plead not guilty, and even to enter pleas of not guilty for them in cases seeming to be involved in doubt or difficulty; and in such cases they should record what they had done. All the pleas should be duly recorded, and the prisoners

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should be removed to await the day fixed for the trials. Prisoners appearing to be lunatic, or standing mute of malice when called upon to plead, should be remitted to be dealt with as they are at present. The witnesses against those prisoners who pleaded not guilty, or who did not plead before the Commissioners, for the reasons which we have mentioned, should receive notice to attend and give evidence at the trials of the prisoners, against whom they were required to appear. The witnesses against those prisoners who pleaded guilty should have no notice sent to them, unless the presiding judge, recorder, or magistrate desired to question them before passing sentence, when they should be summoned to appear at a particular time; and the fact of receiving no such notice or summons should discharge them from their obligation to be in readiness to give evidence.

At the commencement of the Assizes or Sessions to which they have been committed for trial, those prisoners who had pleaded guilty should be sentenced. Those who had not pleaded before the Commissioners should also be dealt with; and those of them found to have stood mute of malice should be punished for their contumacy. The trials of the prisoners who had pleaded not guilty should then be proceeded with in regular order.

We have now laid before our readers our plan for cheapening the administration of our Criminal Law. We cannot tell them the sum which the nation would be likely to save by adopting it. The kindness of the gentlemen in charge of the records at Bolton and at the Salford Hundred Prison has, however, enabled us to collect some information bearing upon the subject. During ten years, ending July 29th, 1870, the total number of prisoners called upon to plead at sessions for the borough of Bolton was 1,183. Of these, 459 pleaded guilty to the charges made against them; 492 pleaded not guilty, and were tried and convicted; and 232 pleaded not guilty, and were tried and acquitted. Our information respecting the pleas of prisoners at county sessions and at assizes is limited. We are able to state, however, how the prisoners pleaded at twelve sessions for the Hundred of Salford, held in the years 1869 and 1870, and also at six Manchester assizes, held during the same years. We can also

tell our readers the number of prisoners, who either pleaded guilty or were convicted at these assizes and sessions, after having been previously convicted. At the twelve sessions in question the total number of prisoners called upon to plead was 718. Of these, 245 pleaded guilty to the charges made against them; 362 pleaded not guilty, and were tried and convicted; and 111 pleaded not guilty, and were tried and acquitted. Of those who either pleaded guilty or were convicted, 253 had been previously convicted, and they all pleaded guilty to the counts charging the previous convictions. At the six Manchester assizes which we have mentioned, the total number of prisoners called upon to plead was 382. Of these, 79 pleaded guilty to the charges made against them; 217 pleaded not guilty, and were tried and convicted, and 86 pleaded not guilty, and were tried and acquitted.

Of those who either pleaded guilty or were convicted, 82 were charged with having been previously convicted; 79 of these pleaded guilty to the counts charging the previous convictions, and 3 pleaded not guilty to them, but were found by the juries who tried them to have been previously convicted as alleged. If complete statistics were collected, respecting the pleas of criminals to counts charging previous convictions, it would be found that such charges are almost invariably admitted by them.

We believe our judges, recorders, and chairmen of magistrates, will agree with us, that the prisoners who plead not guilty to these counts do not reach one per cent. of the total number of prisoners against whom previous convictions are charged.

The statistics which we are able to put before our readers are not very recent. We merely use them, however, to show the average number of prisoners who plead guilty to the charges made against them at assizes and sessions; and, since there is no reason to suppose that the average practice of prisoners as to their pleas is variable, they are as valuable for the purpose for which alone we use them as they would have been if they had included the pleas of the last batch of prisoners arraigned.

Our readers are now in a position to form some estimate of the loss to the public, and of the inconvenience and loss

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to private individuals, occasioned by our present method of administering this branch of our Criminal Law. They see, that a large proportion of the prisoners called upon to plead at Assizes and Sessions plead guilty to the principal charges against them; and that almost all of them plead guilty to the counts charging previous convictions.

And since we have shown how the attendance of witnesses against prisoners who take this course can be easily rendered unnecessary, we think we have made out a case for the amendment of our criminal law procedure which we have proposed. If it were so amended, both the State and individuals concerned as witnesses in criminal cases would be largely benefited, without occasioning any public inconvenience, or any injury to persons accused of crimes; who would merely be required to make up their minds as to their pleas a day or two earlier than they are called upon to do under our present procedure.—*Law Magazine*.

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Great lawyers offer in their lives little to interest the general public, unless, like an Eldon or a Romilly, they make a prominent figure in politics, or leave their mark in Parliamentary history. It was not surprising, therefore, to find, last September, that when the newspapers had to record the death of Sir George Honyman, they had nothing more to say of him than that he was the son of one baronet, the nephew of a second, the brother of a third, with such other details as peerages and baronetages supply. But in the eyes of the profession which he long adorned, his memory calls for something more than this. The high position which he long occupied in its ranks gives his life an interest to the legal profession; and it should not be consigned to oblivion, even if he were held in less affectionate remembrance on account of his personal qualities.

The grandson of two Scotch judges (the Lord Justice Clerk, Lord Braxfield, and Sir William Honyman, Lord Armadale,) Sir George, from early boyhood,

dreamed of following that thorny road which leads to the woolsack. Indeed, there is a family tradition that at the early age of ten or twelve he was already giving expression to these aspirations in verse. Nature had endowed him with some of the most solid, if not the most brilliant, gifts for a legal career. He was not a great orator, but he had a clear head, a keen, quick intellect, a memory of rare power and tenacity, and, above all, those habits of patient industry, of conscientious thoroughness and accuracy in all that he did, which are more precious than genius itself. On coming to London in 1838, at the age of nineteen, to enter upon the study of the law, he was introduced to the head of the well-known firm of Martineau, Malton and Trollope, and was received in that house as a pupil. Mr. Martineau was not long in discovering that he had in his office a man of no ordinary capacity, and offered to take him as an articled clerk without premium; but his pupil was ambitious, and the kind offer was not accepted. On leaving those eminent solicitors, at the end of two years, Mr. Honyman passed successively into the chambers of Sir Fitzroy Kelly, then a star of the first magnitude, and of Mr. Gibbons, the special pleader; and in 1832 he started in practice as a pleader.

It has been often and justly remarked, to the honour of the profession of the Bar, that its highest prizes are as accessible to men of the humblest origin as they are to those of the highest birth; but in this boast the fact is often overlooked, that the former have, in the *res angusta domi*, one very decided advantage over aristocratic competitors. The son of a ploughman or miner, of the artisan or tradesman, who attracts notice by remarkable talents, makes friends, in his upward progress through the social strata, among men who are in a position to push him forward, and who have a certain pride in their patronage. But the son of a peer or squire, of a bishop or general, is less likely to find among his comrades or his father's friends those important allies whose help is indispensable to his steps at the Bar. So it was with Mr. Honyman. His father, Sir Ord, was a soldier and a guardsman; his mother, the daughter of an admiral and country gentleman. He had no connection in the law or in

THE LATE SIR GEORGE ESSEX HONYMAN.

commerte. The only legal firm to whom he was known, great in chancery and conveyancing, had little or no common law business to give him. Notwithstanding his abilities and his learning then, the odds in the great game on which he had ventured long worked against him. For seven years it remained doubtful whether the world would ever discover how profound a lawyer was eating his head off in obscurity and neglect, in a small room in Pump Court. But the time was not wasted. It was devoted to reading; chiefly the Reports, old and new. What he read, he read slowly and carefully; and as time went on a great mass of legal learning was accumulated, digested, and engraved in his extraordinary memory. As an accomplished pleader, he was early master of all that astounding lore which was resuscitated by the "New Rules" of Hilary Term, 1834, and which now, happily, lies dead as well as buried in the volumes of Meeson and Welsby; but his favourite study was that branch which was eventually to raise him to distinction—commercial law.

At the end of seven years, however, he had made but little way as a pleader, and he determined to try his fortune at the Bar. It was a wise step; it was the turning point of his career. He was called in 1849, and on joining the Home Circuit at once attracted the attention both of the leaders of the Bar and of the Bench. It was impossible to converse with him on any legal topic without discovering, not only that he was deeply imbued with the general principles of law, and ready in their application, but that he possessed an acute and subtle intellect, and had at his command, to reinforce his reasoning, an overwhelming amount of book learning and knowledge of cases. It was soon felt that a man of unusual power had joined the circuit, and this impression spread from the Bar to the other branch of the profession. The result soon followed. The Home Circuit counted, at that time, in the crowd of its members, Sir Barnes Peacock, Mr. Baron Bramwell, the late Mr. Justice Willes, Mr. Justice Lush, and the late Chief Justice Bovill. Promotion soon removed the first three; some years later, the two others; and much of the business thus cast adrift found its way

into Mr. Honyman's chambers. In 1853 he was one of the most rising men of the day; and thenceforth his career was marked with signal success. He soon became known as one of the first commercial lawyers of the Bar; and after he was appointed a Queen's Counsel in 1867, his reputation and his business in commercial law continued to increase year by year until his promotion to the Bench. When, in 1873, Lord Selborne offered Sir George (as he had become, in 1863, on the death of his father), a vacant seat in the Common Pleas, the choice was not only ratified, it had been anticipated, by the general voice of the profession. Indeed, it was not the first time that he had been designated by that voice for the Bench.

At the age of 54 he seemed to have a long career of distinction and usefulness before him; but, alas! such hopes were soon doomed to sad disappointment. Though he was apparently a strong man, the seeds of a fatal disease appear to have already taken root in his constitution. Hardly had he entered upon the second year of his judicial life, when he was struck down by paralysis as he was summing up a heavy cause at Camarthen. The stroke was slight, and it was thought for some time that, after a brief period of repose, he would be able to resume the duties of his office. But, after some months, it became too evident that his health was shattered beyond all hope. Last February he sent in his resignation, and in a few months more death mercifully closed a life which could no longer be but one of suffering.

Sir George Honyman never had a seat in Parliament. It was not that he was indifferent to politics; on the contrary, he entered fully into the great constitutional and economical questions which divided parties in his time. But he viewed them, as he viewed other questions, without passion or partizanship; and he shrank from those professions of faith which the practical politician who hopes to represent a constituency must submit to make. He shrank still more from contact with "the man in the moon," and other irregularities which have not yet been quite rooted out of our electoral usages and customs; and he used to shrug his shoulders at the thought of all the hand-shaking before

C. L. Cham.]

METROPOLITAN BUILDING & SAVINGS SOCIETY V. RODDEN.

[Ontario.]

the fight, and all the badgering after it, which the candidate undergoes in a popular constituency.

The late judge was a man of singularly attractive character. He was, in truth, a gentleman in all the senses of the word; in birth and education, in manner, and, above all, in heart; he was a genial companion; simple as a child, courteous and unaffected with all; how warm-hearted, how generous and sympathetic, how chivalrous and unselfish, can be known only to those who were most intimate with him. And he had one of those admirable tempers which throws a charm over all who come within its influence; calm to bear all the rubs of life with equanimity, though not cold enough to stifle the indignation of an honest nature at the sight of fraud or villainy, or to conceal disdain for brass when passing in triumphant circulation for a more precious metal. Such qualities won him no ordinary degree of affection.

In his family, and in the inner circle of his most intimate friends he was loved with well deserved devotion. Few men have enjoyed so wide a popularity at the Bar; among the young, for whom he always had a kindly word, as well as among his own contemporaries; and he had many touching marks during his illness of the esteem and regard in which he was held on the Bench. By his death the country lost an eminent lawyer, and the profession a conspicuous ornament; and both in the profession and out of it many a tear has fallen in secret on that grave which closed, not two months since, over one of the best and most loveable of human beings.—*Law Magazine*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

METROPOLITAN BUILDING AND SAVINGS SOCIETY V. RODDEN.

Ejectment—Defence for time—Striking out.

Ejectment on mortgage. Defendant appeared; but on examination under A. J. Act, 1873, he admitted the execution of the mortgage, and that the defence was merely for time. *Held*, that the appearance and defence could not be struck out on the authority of *McMaster v. Beattie*, 10 C. L. J. 103, as defendant was entitled to possession until plaintiff should prove his case.

[January 8, 1876.—MR. DALTON.]

In this case, title was claimed by the plaintiff by virtue of a mortgage, in the proviso for redemption of which default had been made. The defendant appeared, and defended for the whole of the lands claimed. He was subsequently examined under the Administration of Justice Act, when he admitted his execution of the mortgage and default in payment, and stated that he had no *bond fide* defence against the plaintiffs, and had only defended the action in order to gain time, and to enable certain other parties to realize their claims on the lands.

Application was thereupon made in Chambers to strike out the defendant's appearance and notice of defence, on the ground that this was a case in which the same principle would apply as in *McMaster v. Beattie*, 10 C. L. J. 103, and subsequent cases, where pleas pleaded merely for time, and admitted in a proceeding in the cause to be false in fact, were struck out, and leave given to enter final judgment.

MR. DALTON.—I do not think I have power to grant anything which would assist the plaintiffs in the present case. It is true that similar applications have been granted occasionally, and probably no injustice has as yet been done in this way, but my opinion is that I have no jurisdiction in this matter. An equitable defence in ejectment might be struck out if proved to be false or embarrassing, but a defendant who appears has a right to remain in possession until the plaintiff proves his title, and his admissions under examination do not deprive him of this right.

C. L. Cham.]

MEEHAN V. WALSH—BENNETT V. VICKERS.

[Div. Court.]

MEEHAN V. WALSH.

Notice of trial—Amendment—A. J. Act, 1873.

Notice of trial was given by mistake for the 11th January instead of 10th January. The defendant did not appear to have been misled. *Held*, That the plaintiff might amend under the A. J. Act, 1873.

[January 10, 1876.—MR. DALTON.]

Notice of trial had been served on January 3rd for the 11th instead of the 10th of the same month. A summons was obtained calling on the defendant to show cause why the notice should not be amended by changing the date to the 10th.

Murphy showed cause. This is not a case in which amendment should be allowed. A defendant would be justified in paying no attention to such a notice, and he should not therefore be forced to go to trial when he might not have made preparation, relying on his opponent's irregularity.

Mr. Keefer (Hodgins & Black), contra. It is shown that the plaintiff's attorney had made inquiry, and was under a *bona fide* belief that the Commission day was the 11th January. It was well known among the profession that the Assizes would commence about that time, and the defendant could not have been misled. The motion to amend had been made as soon as the plaintiff became aware of the mistake: *Graham v. Brennan*, 11 Irish L. R. App., p. 17.

MR. DALTON remarked that in granting this and other applications of the same kind, which had been made lately, a new practice might seem to be instituted, but he thought this was a case in which the powers of amendment granted by the Administration of Justice Act might properly be exercised. Before the passing of that Act, no such application could have been granted. Now, however, it is enacted that no proceeding at law shall be defeated by any formal objection, and he, therefore, thought that he was justified in making this summons absolute. The proper county was named in the notice, it was correct in every respect except the date, and it was scarcely possible that it could have misled the defendant. Summons made absolute on payment by the plaintiff of the costs of the application.

IN THE FIRST DIVISION COURT OF THE COUNTY OF SIMCOE.

BENNETT V. VICKERS.

Express Company—Agents' powers and liabilities—"Collect on delivery"—Notice to consignee—Collection beyond Company's limits.

A parcel was left with an express company's agent, c.o.d. The consignee lived beyond the express company's limits. The parcel was received by the agent without objection and forwarded by him, and delivered to consignee without the sum due being collected: *Held*, that the company were liable.

The extent of the authority of an agent of an express company, and the liability of the latter under the circumstances set out in this case, discussed.

[BARRIE, November 23, 1875.—ARDAGH, J. J.]

The plaintiff claimed to recover from the defendant, a carrier of goods by express, the value of a parcel delivered to him to be carried to Bracebridge.

The plaintiff's case was as follows: About the 1st of February last, having received an order from one Gow, living at Bracebridge, for some goods, the plaintiff made up a parcel containing same, addressed to Gow, and marked C.O.D. With the parcel, and inserted underneath the string fastening the parcel, he sent a bill of the goods in an envelope, not closed up, also addressed to Gow. At the trial the plaintiff called his son (a grown-up lad), who detailed how he had on the day in question taken this parcel to the express office in Barrie, and, after some little delay—owing to the clerk whose duty it was to receive such parcels being otherwise engaged—delivered it to one Charles Edwards, a clerk in the office of Mr. Edwards, the defendant's agent. He called his (Edwards') attention to the bill accompanying it, and told him it was C.O.D.

For the defence, Charles Edwards, the clerk above named, was called, and admitted that he could not swear that the envelope alluded to was not there, and that though plaintiff's son, when delivering the parcel, may have said C.O.D., yet he did not point to the bill. He stated that the limits of defendant's delivery did not extend beyond Severn Bridge, where the line of the Northern Railway Company ended; that any parcels for delivery beyond that were handed by the defendant's agent there to the stage-driver, who carried them on to their destination. One Johnson was also called by the defendant. He stated that he had charge of the express business in the absence of the defendant's agent at Barrie; that they invariably refused to colle

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[Ontario.]

sums payable on parcels marked C.O.D. beyond their limits, and that if the bill mentioned as sent with this parcel had been seen by him, he would have refused to collect it; that they had no agent at Bracebridge. Looking at the entry of the receipt, &c., in the proper book, made by him, and not seeing C.O.D. placed against it, he would say there had been no bill sent with the parcel; that though the parcel might have been marked C.O.D., yet if no bill had accompanied it, he would pay no attention to this direction, as unpaid parcels were often sent so marked without bills accompanying them. In that case, the letters C.O.D. would be supposed to be and be taken to mean a direction by the consignor to the defendant to collect his charges thereon for carriage; that Mr. Edwards had authority to make contracts for delivery within defendant's limits, but not beyond.

ARDAGH, J. J.—I have no hesitation in saying, and it is not argued by defendant to the contrary, that if a contract were made with plaintiff to carry this parcel to Bracebridge, that is, beyond defendant's limits, defendant would be liable, unless he had given express notice to the plaintiff that he would not be liable after the goods had passed into the hands of another carrier. Companies acting as common carriers do constantly limit their liability in this way. The point, however, on which the defendant does rely is this, that Mr. Edwards, as agent for defendant, had only a limited authority, that is, authority to receive goods for delivery and collect moneys due on same within certain limits, and not beyond; that if he (Mr. Edwards) did make a contract to deliver or collect beyond the limits, it was in excess of his authority, and defendant is not liable.

No doubt the general rule is that a party dealing with an agent, and knowing him to be such, must make himself acquainted with the nature and extent of that agent's authority. There must be, however, some limit to this rule, and some reason in it. A person held out to be an agent must be presumed to have all needful powers to carry out the object of his agency; but if he goes out of his way, and does acts not so necessary, his principal will be exonerated. Now, here Mr. Edwards had authority of contract with third parties for the carriage and delivery of goods for reward, this being the chief object of defendant's business. The announcement of this business being "Vickers' Northern Express," and its headquarters being in Toronto, it might reasonably be supposed that the business has to be to the north of that city. Suppose a person at Toronto were to enter

defendant's office there, and deliver a parcel for England to some clerk, who, in ignorance, received it, and on the discovery of this by some one in authority, or who knew better, this parcel was delivered over to some other company or carrier, who, in the course of their business, undertook the carriage of goods to England, it could not be argued that defendant would be liable in such a case after loss of this parcel by the second company, even though it was received by him in the manner mentioned, there being nothing in his advertised business to warrant any one assuming that he carried goods to England. In the present case, however, it may fairly be argued that plaintiff might reasonably presume that Bracebridge was within defendant's limits of carriage, and nothing is shown to have come to his knowledge whereby he had notice of the fact that it was not; and it is a fact that for the greater part of the distance between Barrie and Bracebridge the defendant does receive goods C.O.D., and does deliver them. It would then be only reasonable to expect that defendant's agent here, when required to book parcels beyond the limits, should, if he had no authority to do so, state the fact. It was something almost peculiarly within his own knowledge. His receiving a parcel to book for a certain point is something which, in itself, does not suggest to the consignor any inquiry as to the extent of the agent's authority, for he (the agent) is there for the very purpose of receiving and booking parcels, and it would be most natural for the sender to presume that the agent had such authority if the parcel was received without demur. The agent's receiving the parcel to deliver at Bracebridge without objection was tantamount to his answering in the affirmative the question: "Will you receive this parcel and deliver it at Bracebridge?" I observe that while Johnson states that Edwards had no authority to receive parcels to deliver beyond Severn Bridge, yet he did receive it for that purpose, but says that, had he known it to be C.O.D., he would not have received it, and that they invariably refuse to receive parcels, so marked, for delivery beyond their limits, thus leaving it to be inferred that they do receive them in such cases when not marked C.O.D.

While, then, I would be inclined to hold that if the agent had entered into a contract involving conditions unusual, or such as would not usually be supposed to form part of such a contract, the principal would not be liable, yet in this case I cannot see that the condition—for the breach of which the plaintiff now sues—was unusual or extraordinary. Receiving parcels to

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BENNETT v. VICKERS.—NOTES OF RECENT DECISIONS.

[Quebec.

transmit and deliver C.O.D. was part of the agent's authority. The difficulty in this case arises from the fact of the agent, as he swears, never having seen the bill accompanying the parcel. Had he done so, he would, he says, have refused to receive it. As, however, I must upon the evidence find that this bill was delivered at the agent's office, along with the parcel, and that this parcel was marked C.O.D., and that the clerk's attention was called to the fact that it was C.O.D., upon these facts, I must also find that the plaintiff has done all that he was called upon to do. The loss arises from some default or neglect on defendant's part. This being so, and the defendant's agent (as I find) having made the contract with plaintiff, can I allow the defendant now to evade the loss resulting directly from his act, and set up the plea that his agent has gone beyond his authority?

The defendant's objection, put in other words, is, that his agent had authority to make special contracts (for he admits receiving parcels to go beyond limits, but not C.O.D.); that on this occasion he did not make one of these; leaving the inference to be drawn that the agent, having chosen to make another contract, different from the special one he was authorized to make, the defendant was not liable. This I felt at the trial to be a grave objection, but still one to which I did not feel inclined to give effect. Had the plaintiff been in the habit of receiving from defendant's agent receipts in the shape of contracts whenever he deposited goods for transmission, it might be urged that he had notice of the extent of the agent's authority (assuming, for the sake of argument, that these contracts did show the extent of the authority). The plaintiff, however, swears, that he never did receive one of these contracts, consequently no notice to him is proved. But even if it was the custom of the agency to give these receipts, the plaintiff might fairly infer that, as the agent agreed to forward this parcel, he would have no objection to make out a written document embodying the contract, or to alter one of his printed ones to suit the changed terms. No evidence, however, was given at the trial to show that, even if one of these printed contracts had been given to plaintiff, it contained any notice of the extent of the agent's authority.

The case of *Muschamp v. Lancaster and Preston Junction Railway*, 8 M. & W. 421, is the case constantly quoted where the liability of a railway company, which has connecting lines, for losses beyond their own lines, is the subject of dispute. Rolfe, B., there stated the law to the

jury in this way: "That where a common carrier takes into his care a parcel directed to a particular place, and does not by his *positive agreement* limit his responsibility to a part only of the distance, that is *prima facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, and the same rule applied although the place were beyond the limits within which he in general professed to carry on his trade as a carrier." If, then, it were a simple matter of liability by the defendant (apart from a question of agency altogether), I should, under the authority of this case, have to find for the plaintiff. The defendant has not protected himself by any positive agreement, as no written contract seems to have been entered into at all with the plaintiff, who had no notice of any such limitations or conditions (whatever they may be) as the printed receipt may show.

As to the question of the agent's authority, I think it was quite natural for the plaintiff to infer that it was within the scope of the agent's powers to receive the parcel for Bracebridge C.O.D., and that the defendant should be bound by his act and the loss arising therefrom.

Judgment for plaintiff.

QUEBEC REPORTS.

NOTES OF RECENT DECISIONS.

(From the *L. C. Jurist*, Vol. 19.)

INSOLVENCY.

Held—1. Although it be not proved that a party has traded for over three years, yet such party will be still considered a trader if her debts are unpaid, and will be liable to the provisions of the Insolvent Act of 1869. —*Buchanan v. McCormick*, 29.

2. A creditor of a debt of a non-commercial nature, can demand an assignment from a trader, under the Insolvent Act of 1869.—*Id.*

3. The fact of the debt upon which a creditor bases his demand for an assignment being in litigation and disputed in the Superior Court, does not prevent that creditor from taking proceedings in Insolvency against his debtor founded upon the disputed debt.—*Id.*

4. A judgment being appealed from, and then the defendant having declared that he did not object to execution going against him, and having given security for costs only in appeal, the creditor may base his demand for assignment upon such judgment.—*Id.*

NOTES OF RECENT DECISIONS.—CORRESPONDENCE.

An assignee to an insolvent estate is not a judge within the meaning of article 176 of the Code of Civil Procedure, and therefore cannot be recused in the mode prescribed by the Code for the recusation of a judge. Proceedings to disqualify an assignee under the Insolvent Act of 1869, must be taken in the mode prescribed by sect. 187 of the Act. —*Mechanics Bank v. Brown*, 295.

PATENTS OF INVENTION.

Held—That the mere importer of an invention, which has been patented for many years in the United States, by some other party, is not the inventor or discoverer thereof, within the meaning of "The Patent Act of 1869;" and a patent obtained by him under the said Act on the ground that he was the inventor or discoverer, is null and void. —*Woodruff v. Moseley*, 169.

INSURANCE—WAREHOUSE RECEIPT.

Held—1. That goods held under a duly endorsed warehouse receipt, as collateral security for advances, may be properly and legally insured as being the property of the holder of such receipt, being the party who made the advances. —*Wilson v. Citizens' Insurance Company*, 175.

2. That, in an action for the recovery of the insurance of said goods, it is sufficient to establish that goods of the character and brand and of the quantity claimed were actually in the building where the goods were stored at the time of the insurance, and at the time the building and its contents were wholly burnt, without proving the actual identification of the goods described in the warehouse receipt. —*Id.*

ELECTION FOR DOMINION—PLACE OF TRIAL.

Held—That, where the order of the Judge fixing a trial under "The Dominion Controverted Election Act, 1874," omitted to specify the place of trial, no trial could be had, though notice of time and place under sec. 13 had been given to respondent, and he was present in Court. —*Ryan et al. v. Devlin*, 194.

SHIPS—COLLISION.

A steamship, after colliding with a sailing vessel, continued her course, and struck another sailing ship. *Held*, that the steamship, which had disregarded the rules of navigation before the first collision, could not plead the fault of the vessel first struck to a suit brought against her for the second collision. —*The Princess Alexandra*, 195.

LEGISLATIVE ASSEMBLY—JURISDICTION AS TO ARREST.

Held—1. That the Legislative Assembly of the Province of Quebec has power to compel the attendance of witnesses before it, and may order a witness to be taken into custody by the sergeant-at-arms if he refuses to attend when summoned. —*Ex parte Dansereau*, 210.

2. The omission to state, in the Speaker's warrant of arrest, the grounds and reasons therefor, is not a fatal defect. —*Id.*

3. The Quebec Statute, 33 Vict., cap. 5, is within the powers of the Local Legislature. —*Id.*

HABEAS CORPUS — DISCHARGE — SECOND ARREST.

Held—That a person who has been discharged from custody upon a writ of *habeas corpus*, cannot be arrested a second time for the same cause, or where no new or other cause of arrest is disclosed. And this principle was held to apply, though it appeared that the warrant was quashed on the first occasion by a Judge in Chambers, on grounds which, in a case precisely similar, were subsequently held by the Court to be insufficient. —*Ex parte Duvernay and Re parte Cotté*, 248.

COMMON CARRIER.

Held—That common carriers are responsible for damage caused by fire breaking out upon board of a steamboat, unless such fire was not attributable to their negligence; and the *onus probandi* is upon the carriers to account for the fire and prove that it did not arise from their fault. —*Canadian Navigation Company v. Hayes*, 269.

STREAM—FLOATING LOGS.

Held—That the public have a right of servitude over all streams, whether navigable or not, or floatable or not; and, therefore, a party erecting a dam across a river in such a manner as to obstruct a free passage of floating logs, is liable to such damage as the owner of the logs may suffer by such obstruction. —*McBean v. Carlisle*, 276.

CORRESPONDENCE.

Barristers and Attorneys by Act of Parliament.

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—The Bill introduced in the Local Parliament, entitled "An Act to enable the Law Society of Ontario to admit Emmanuel Thomas Essery as a barrister-at-law," shows the extent to which special legislation is invoked. All persons ought to undergo the necessary educational training, and incur the expense to prepare them for examination as to their possessing the necessary scholastic attainments, to pass the Law Society. Some of them afterwards attend lectures, keep terms, pass examinations, etc., but the applicant in this case comes forward with a petition setting up that special legislation should be restored to—not because he has ever

CORRESPONDENCE—REGULÉ GENERALES.

passed a matriculation examination, or that he has the necessary scholastic attainments, which it is considered barristers ought in some measure to possess—but that in Hilary Term, 1869—six years ago—he passed the examination prescribed for an attorney, and was then admitted to practice as an attorney and solicitor, and has ever since been actively and continuously engaged in the practice of his profession.

If these reasons are sufficient, there is only one step further which the public at large will soon find out and take, *i. e.*, open the profession to all comers on their complying with that which this gentleman asks to have done in his case, *i. e.*, “*passing the usual final examination* prescribed by the rules of the Law Society,” without compliance with any requirements or provisions of law or other “rules and regulations in that behalf.” If the legal educational test is the only one which is to be imposed on this gentleman, why may not all other persons be admitted on the same terms? What is the use of the matriculation of students and intermediate examinations? and why should they be subjected to the trouble and expense of attending at Toronto, if other persons, by an Act of Parliament, are allowed to stride over them all, and do, by a little importunity, that which it costs others much study and money to reach.

Yours truly,

UNION.

[There is much in what our correspondent says; but he will see by reference to the Law Society Act of this session (*infra*, p. 41), that the case will now be dealt with by the Society.—*Eds. Law Journal.*]

REGULÉ GENERALES.

MICHAELMAS TERM, 39 VICT.

1. Every rule nisi to rescind the order of a Judge or Clerk of the Court sitting in Chambers shall be set down to be heard on a Paper Day in Term, or on such other day as the Court may specially order.

2. It shall not hereafter be necessary to enlarge from one Term to another, any rule, de-

murrer or special case entered by the Master on the general list.

Osgoode Hall, Wednesday, Dec. 1st, 1875.

MICHAELMAS TERM, 39 VICT.

It is ordered as follows:—

1. In all causes where the record is only entered for trial at the Court of Assize and Nisi Prius, it shall be deemed to be entered and to remain on the list of causes for trial until it is tried or otherwise disposed of either at the Court at or for which it is entered, or at a subsequent Court.

2. If any record entered for trial be not tried or disposed of at any particular Court of Assize and Nisi Prius, they shall, unless the Court otherwise order, be made remanets, and as such stand at the head of the list of causes for trial at the next ensuing Court, and so from Court to Court till tried or otherwise disposed of.

3. In the case of remanets no notice of trial or assessment shall be given or necessary.

4. The party entering the record for trial or assessment may countermand his notice of trial or assessment after the close of the first or any subsequent Court by giving a written notice of countermand to the opposite party and to the Clerk of the Court of Assize and Nisi Prius at least ten days before the ensuing Court.

5. A list of causes entered for trial shall on the first day of each Court of Assize and Nisi Prius, be posted up by the Clerk of the Court in some conspicuous place in or near the Court Room, there to remain during the whole time of each Court of Assize and Nisi Prius.

6. It shall be the duty of the Clerk of the Court, from time to time, as each cause on the list is tried or otherwise disposed of, to strike the same from the list or make other necessary entry as to the same.

Osgoode Hall, Dec. 4th, 1875.

BOOKS RECEIVED.

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THE LAW OF LITERATURE, by James Appleton Morgan. New York: James Cockcroft & Co., 1876. R. Carswell, Toronto.

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LAW SOCIETY, MICHAELMAS TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, MICHAELMAS TERM, 39TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:
No. 1842—KENNETH GOODMAN.

THOMAS HORACE MCGUIRE.
GEORGE A. RADENHURST.
EDWIN HAMILTON DICKSON.
ALEXANDER FERGUSON.
DENNIS AMBROSE O'SULLIVAN.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit. The following gentlemen received Certificates of Fitness:

THOMAS C. W. HASLETT.
ANGUS JOHN MCCOLL.
DENNIS AMBROSE O'SULLIVAN.
DANIEL WEBSTER CLIMDENAN.
GEORGE WHITFIELD GROTE.
CHARLES M. GARVEY.
ALBERT ROMAINE LEWIS.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates.

No. 2585—GOODWIN GIBSON, M.A.
JOHN G. GORDON, B.A.
WALTER W. RUTHERFORD, B.A.
WILLIAM A. DONALD, B.A.
THOMAS W. CROFTERS, B.A.
JOHN B. DOW, B.A.
JAMES A. M. AIKENS, B.A.
WILLIAM M. READE, B.A.
EDMUND L. DICKINSON, B.A.
CHARLES W. MORTIMER, B.A.

Junior Class.

ROBERT HILL MYERS.
WILLIAM SPENCER SPOTTON.
WILLIAM JAMES T. DICKSON.
WILLIAM ELLIOTT MACARA.
JAMES ALEXANDER ALLAN.
WALTER ALEXANDER WILKES.
WILLIAM ANDREW ORR.
ALFRED DUNCAN PERRY.
JAMES HARTEY.
HERBERT BOLSTER.
JOHN PATRICK EUGENE O'MEARA.
CHARLES AUGUSTUS MYERS.
CHARLES CROSBIE GOING.
DAVID HAVELLOCK COOPER.
EMERSON COATSWORTH, JR.
WILLIAM PASCAL DEROCHE.
FREDERICH WM. KITTMMASTER.

Articled Clerk.

JOHN HARRISON.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil, Aeneid, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Smith's Manual; Common Law, Smith's Manual; [Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkers on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

EDITORIAL ITEMS.

DIARY FOR MARCH.

1. Wed...Ash Wednesday. Last day for delivering appeal books in Court of Error and Appeal.
5. SUN...1st Sunday in Lent.
6. Mon...Name of York changed to Toronto, 1834.
12. SUN...2nd Sunday in Lent.
13. Mon...Gen. Sess. and County Court for York. Last day for J. P.'s to make returns of convictions to Clerk of the Peace.
15. Wed...Court of Appeal sits.
17. Frid...St. Patrick's Day.
19. SUN...3rd Sunday in Lent.
21. Thur...Sir George Arthur, Lieut.-Governor, 1838.
26. SUN...4th Sunday in Lent.
30. Thur...Lord Metcalfe, Governor-General, 1843.

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LAW SOCIETY OF UPPER CANADA. 72

THE Canada Law Journal.

Toronto, March, 1876. Part I.

OWING to a pressure of matter of interest to our readers we publish this as an extra number. It will occasionally be desirable to do this, and though it entails extra expense, we trust it will prove to be time and money well expended.

WE call attention to the advertisement of the Law Society, to be found in another place, as to the election of Benchers. We shall refer to that matter in our next issue, as well as to the several other matters of present great interest to the profession.

At the suggestion, we understand, of Lord Dufferin, the Judges of the Supreme Court have been robed in the scarlet and ermine of Westminster Hall. The dress is in itself an imposing one, and it is not inappropriate that they should, even in this matter, follow the example of the English Bench.

OSGOODE Hall is indulging in the unusual spectacle of one Common Law Court sitting in *banc*, after the other has risen. This difference in the length of their *sederunt* is owing to a provision in a recent Statute, which adds a week to the sitting of the Queen's Bench, whilst the Common Pleas sits for two weeks only, as formerly. This "one-legged" arrangement was rendered necessary by the arrears in the former Court, which it was hoped would thus in a great measure be worked off. Some statistics in another place show that their is always more business in the Bench than in the Pleas.

WE hear sometimes about "invaders of the profession;" but the inventor of the following atrocious document invades,

BUSINESS IN THE COURTS.

not only the rights and privileges of the profession, but the duties of Clerk and Sheriff as well. If his nerve be equal to his brutality and impudence, we should recommend him to the latter official as a desirable *Calcraft*. The document is headed by the Royal Arms, and then proceeds as follows:—

Victoria, Queen of Great Britain and Ireland,
Defender of the Faith, &c.

PROVINCE OF ONTARIO,
COUNTY OF YORK
TO WIT:

Toronto,

1876

Mr.

having placed your account in my hands for collection, amounting to \$ with instructions to proceed against you if the same is not paid at once, I beg to inform you that unless the same be paid forthwith, I will be compelled to apply for a judgment summons to enable the Bailiff to take your goods or arrest you.

Yours respectfully,

JOS. MCGAFFIKIN, G.C.A.,
P. O. Box 2566.

Highway robbers are occasionally pretty roughly handled, and when they are, the law as well as the public says: "Served them right." Though the law may not reach this individual, we doubt if it would very severely punish any indignant debtor who might think proper to treat this G. C. A. (whatever that may be intended to mean), as one would treat a pick-pocket caught *flagrante delicto*. We say the law may not reach him, but it is not quite clear that he has not committed a felony under sec. 181 of the Division Courts' Act: (see O'Brien's D.C. Acts, p. 91, and notes, and *Reg. v. Evans*, 3 U. C. L. J. 119).

If this person has not brought himself within the law, he has adopted an ingenious mode of evading it by a hairs' breadth. In the meantime, we should recommend him to try some other business for a living.

BUSINESS IN THE COURTS.

It is said that anything may be proved by figures, and it is also said that figures cannot lie. The first saying is very applicable, when it is sought to establish pet theories by incomplete and inexact

statistics; but, where they are complete and exact, it is difficult to refuse credence to the tale they tell.

It was the generally received impression that the Administration of Justice Act would tend, and had in fact tended, to decrease the business in the Court of Chancery, owing to the large equitable powers given to the Common Law Courts. We have been at some pains to ascertain whether there has been, so far, any such result in fact; and we must confess to some surprise at finding that, instead of a decrease, there has been a very large increase to the business of that Court during the past year.

The following statements, taken from a return recently made to the House of Assembly, make this clear:—

YEAR.	BILLS.	DECREES.	REPORTS.	ORDERS.	COURTS REV. SD.	RE-HEARINGS.	TORONTO.	
							CLAUDE F. & H. CHURCHILL PAPER.	
1869	1355	702	440	6...	574	28	53	334
1870	1444	743	464	5923	518	19	39	344
1871	1504	613	487	3172	417	21	43	375
1872	1608	671	496	3336	547	23	39	370
1873	1728	782	648	3440	575	24	78	454
1874	1647	777	732	3336	616	41	75	436
1875	2071	942	780	3290	714	97	73	523

* This is an estimate only, but probably correct. The number of Orders is diminished by the effect of the General Orders of February, 1875.

† As there is no return as yet from the Deputy Registrars of lists of causes set down for Examination and Hearing in their several Comoxes: this return does not contain that information.

A RETURN showing the number of Bills filed in, Decrees and Orders issued by the Court of Chancery since 1870, and the number of cases heard or otherwise disposed of at the sittings in Toronto and the number of cases re-heard during the same period.

BUSINESS IN THE COURTS.

REPORT from Accountant's Office, Court of
Chancery, January, 1876.

Paid into Court in various suits and matters,			
from 15th Dec., 1868 to 15th Dec., 1869			\$455,920 20
do 1869	do 1870		488,075 66
do 1870	do 1871		564,513 12
do 1871	do 1872		683,479 64
do 1872	do 1873		644,645 02
do 1873	do 1874		569,239 26
do 1874	do 1875		710,369 34

\$4,218,615 74

Paid out of Court in various suits and matters,			
from 15th Dec., 1868 to 15th Dec., 1869			\$325,848 97
do 1869	do 1870		472,110 32
do 1870	do 1871		546,271 06
do 1871	do 1872		677,742 17
do 1872	do 1873		652,398 10
do 1873	do 1874		623,034 86
do 1874	do 1875		678,942 81

\$4,078,721 80

It will thus be seen that there were 424 more bills filed in 1875 than in 1874, and 736 more than in 1869, six years ago. This only shows inferentially an increase of contested cases, the returns being incomplete from the outer offices as to causes set down for examination and hearing; but the increase of contested cases may be taken for granted from the greater number of bills filed. A close investigation shows that although there are not nearly as many motions for injunctions to stay actions at law as formerly, yet many of the cases which arose out of that jurisdiction of the Court, are now taken to Chancery in the first instance. It must also be borne in mind, that the Act for quieting titles, and the law relating to mechanics' liens, have largely increased the work of the court.

It is difficult to obtain anything like complete or satisfactory statistics of the business done at common law, as much would have to be gathered from the Deputy Clerks of the Crown in the different counties, and much work is done at Osgoode Hall which is not embodied in the returns which have been made. But it is evident, from the following statement of business in the County of York (we have been unable to get returns from the outer Counties), that there has been even a greater increase in the Courts of Queen's Bench and Common Pleas than there has been in Chancery:—

Year.	No. of Writs.	Appearances.
1870	734	400
1871	812	458
1872	891	469
1873	1040	625
1874	1049	566
1875	1427	790

The state of the contested business at Common Law is fairly shown in the following return as to Term work, from 1872 inclusive, though it does not by any means represent the actual work of the Courts; as only arguments strictly so called, and not a multitude of ordinary motions, are included in these figures:—

Year.	Term.	New Trial Arguments.		Other Arguments.	
		Q. B.	C. P.	Q. B.	C. P.
1872.	Hilary	25	20	15	10
	Easter	37	30	26	16
	Michaelmas	23	28	21	17
1873.	Hilary	19	21	17	11
	Easter	25	32	28	16
	Michaelmas	24	27	37	21
1874.	Hilary	18	20	21	11
	Easter	28	26	24	15
	Trinity	21	16	16	4
	Michaelmas	19	22	18	13
1875.	Hilary	20	23	18	11
	Easter	23	17	12	7
	Trinity	3	2	14	6
	Michaelmas	41	52	12	14

In addition to the above there were arguments before single judges in vacation to 31st December, 1875—in the Queen's Bench 107, and in the Common Pleas 47.

The above statement may be summarized, including arguments before a single judge, thus:—

New Trials & Arguments	1872	1873	1874	1875
Queen's Bench.....	152	150	195	220
Common Pleas.....	121	128	134	164
Totals.....	273	278	329	384

As to the relative increase of business between the Common Law Courts and the Court of Chancery, it is difficult to form any estimate which is not to a great extent imaginary; and it is almost impossible as yet to say, with any degree of certainty, what the effect of the Administration of

THE MERCER WILL CASE.

Justice Act has been in this respect. The figures show that there has been a large increase of business in 1875 in all the courts; but it would be premature to assert that the effect has been to throw more work into the Common Law Courts from the Court of Chancery. The cause of this greater increase in the Common Law Courts has probably nothing to do with recent legislation as to procedure in the Courts; but we may safely assume, from the figures and from general information, that it has been caused by their jurisdiction having been extended; whilst the other causes mentioned above have operated, not only to supply the deficiency thus arising in Chancery, but to add to the business there.

It may then be noticed that there were, in addition to the cases actually argued at the end of 1875, ninety-one rules ready for hearing in the Queen's Bench, and thirty-nine in the Common Pleas—an increase to the arrears ages of previous years. These arrears have not of late years accumulated to anything like the same extent in the Court of Chancery, owing, doubtless to the fact that the bulk of the work is there disposed of by Judges sitting singly—a system which is likely to lead to the best results in facilitating business in the Common Law Courts.

None of these returns give any information as to the number of cases heard on circuit or at Assizes in the outer Counties; but, those relating to Toronto are probably representative of that class of business of the country.

THE MERCER WILL CASE.

- We do not propose to say anything about the main features of this case, which have been sufficiently before the eyes of our readers through the medium of the lay press. But, as in the Tichborne case, many interesting and some

novel questions are connected with the trial, directly or collaterally, and to them it may not be inadvisable to call attention.

(1.) It appeared in the evidence that young Mercer had given a bond for \$30,000 to one of the witnesses, which was to be his reward in the event of success. This class of evidence is admissible for the obvious reason that it seriously affects the credibility of the witness; and also for the further reason, which was clearly brought out in *Moriarty v. London, Chatham & Dover Railway*, 18 W. R. 625, that all evidence is relevant which goes to prove the manner in which a party has procured his witnesses, as tending to prove an admission by his conduct that his case is bad.

(2.) It further appeared that one of the solicitors had taken a bond in the penal sum of \$20,000 to secure payment of his costs and charges. It seems to be clear that any such arrangement cannot benefit the solicitor. The authorities are uniform that an agreement, by which the attorney would get the client to pay him a larger sum than the Master would allow on taxation, is one which cannot be enforced: *Phillips v. Heale*, 8 C.B.N.S. 647. In that case Erle, J., observed: "Such agreements are void; otherwise, an attorney might hang up in his office a tariff of his own, and clam to bind all his clients by it, as doing business for them on the terms of a special bargain." See also *Re Geddes*, 2 Chan. Chan., p. 447. In *Re Norman*, 30 Beav. 196, the Master of the Rolls held that an agreement between an attorney and an intended client for the payment of a fixed sum for costs to be incurred (*i.e.* by way of anticipation) was illegal—bad on its face—need not be set aside—was mere waste paper.

(3.) The important constitutional questions, agitated in *Cullen v. Cullen* (see 10 C. L. J. 126), touching the right of the Bishops of the Roman Catholic Church to dispense with banns,

THE MERCER WILL CASE.

and marry without license, were again discussed. A *quietus*, however, has been given to all these by the Ontario statute, 37 Vict. c. 6, sec. 1, in cases where the parties have, after celebration, "lived together and cohabited as husband and wife," and where the validity of such marriage had not been theretofore litigated. The judge remarked upon the tautology involved in the expression, "lived together and cohabited." It is manifest that the terms are synonymous etymologically, and even in legal parlance, as the counsel observed they are so used, and we find Lord Eldon speaking of "cohabitation without reconciliation." But another point was raised during the argument of more practical consequence: that is, touching the admissibility of marriage and other entries in the parish record kept by the Romish clergy. It was contended, on the one hand, that such entries are only admissible when made in pursuance of a duty imposed or prescribed by law. It was answered, on the other hand, that it was enough if the entries were made in the course of duty by an ecclesiastic of the Church, in obedience to synodical regulations. The weight of authority seems in favour of this position, though it is by no means clear. Reference was made to the cases of *Ravens v. Richards*, 28 Beav. 370, and *Malone v. O'Connor*, 2 Ir. Eq. 16, which last, however, was not followed in *Ennis v. Carroll*, 17 W. R. 344. This is a matter which should not be left in doubt. It was not necessary in this case for the Vice-Chancellor to decide the point, and he abstained from expressing any opinion thereon. It is, however, a matter of vital concern to many people, affecting their status and civil rights; and it is not, in our judgment, unfitting that the Legislature should make provision for the admissibility of all such records kept by the ministers of all religious bodies, who be authorized to celebrate marriage.

(4.) Speculation was rife as to what the Crown would do for young Mercer, he being declared illegitimate by the Court, in the event of its being ultimately ascertained that his father was also "a nobody's child—*filius populi*." Since the disallowance of the Ontario Escheat Act one has no guide to refer to but the English fiscal practice in cases of personal estate, which has escheated. Of course, the Crown acts *ex mero motu* and *ex gratia*. After discharging all liabilities on the property, which, in this case, is chiefly personalty, a proportion is reserved, varying according to the amount of the clear surplus. If it is under £500, one-tenth is reserved; over £500 and under £1,000, one-eighth; over £1,000 and under £5,000, one-sixth; over £5,000 and under £10,000, one-fourth; £10,000 and upwards, one-third. After this the claims of the nearest *natural* relatives are recognized, and the balance is distributed in the shares allotted by the Treasury. Thus it appears to be left pretty much in the discretion of the Crown to apportion the estate as it thinks best among those relatives, the natural next of kin of the deceased.

Lord Eldon, in *Moggridge v. Thackwell*, 7 Ves., 71, adverts to the fact that when there is an escheat for want of heirs, and the fact is not communicated, it is usual for the person making the discovery to petition the Crown, stating that there is such an escheat, and praying some reward upon the ground of the discovery, if it can be made out. This, he says, is familiar practice, whether well or ill-founded. And the ordinary rule is for the Crown to give a lease—as good a lease as it can give—to such person. No doubt Lord Eldon refers to the lease for thirty-one years, permitted by 1 Ann. Stat. 1, c. 7. To remedy this, and to give the Crown the right to alienate, 39 & 40 Geo. III. c. 88, was passed, recognizing and sanctioning the practice referred to, and enabling

ACTS OF THE LAST ONTARIO LEGISLATURE—LAW REPORTING.

the Sovereign to make grants of lands escheated, "either for the purpose of restoring the same to the family of the person whose estate the same had been, or of rewarding any persons making discovery of any such escheat." This statute is not in force in Canada; and it is probable that the Crown is, in this country, unable to dispose of the fee in escheated lands, except by a special Act of Parliament in that behalf. This is also a matter requiring legislative intervention.

ACTS OF THE LAST ONTARIO LEGISLATURE.

An Act to amend the Registry Acts.

Her Majesty, &c., enacts as follows:—

1. Section 19 of the Act passed in the thirty-first year of the reign of Her Majesty Queen Victoria and chaptered twenty, intituled "An Act respecting Registrars, Registry Offices and the Registration of instruments, relating to lands in Ontario," is hereby repealed, and the following section shall be substituted in its stead:—

"19. The Registrar or his Deputy shall, for the discharge of all duties belonging to the said office, attend at his office from the hour of ten in the forenoon until four in the afternoon, every day in the year except Sunday, New Year's Day, Good Friday, the Queen's Birthday, Christmas Day, and every day by proclamation of the Lieutenant-Governor appointed to be held as a general fast day or holiday in Ontario; and no instrument shall be registered by him on any such days, nor shall any instrument be received for registration by him on any day except within the hours above named."

2. Section 35 of said Act is hereby amended by inserting therein, after the words "with the will annexed," the words "or an exemplification thereof."

3. Sub-section one of section 41 of

said Act is hereby amended by adding thereto the following words, "or before any Justice of the Peace for the county in which such affidavit may be sworn."

4. Section 71 of said Act is hereby amended by inserting in the seventh line thereof, after the words "the same," the words "or his assigns."

5. Form F in the Appendix to said Act, and referred to in sec. 45 thereof, is hereby amended by striking out the words therein, "Signed in the presence of A.B., clerk of the county court of the county of—," "Seal of Office," and it shall not be necessary that the said certificate shall be witnessed by the clerk of the county court or any other person, or that the seal of the said court shall be attached thereto.

6. Where it is desired to register an instrument other than a will in more than one registry office, the same may be registered in like manner as is provided as to powers of attorney by sections forty-seven and forty-eight of the said Act

SELECTIONS.

LAW REPORTING.

It is a strange, but nevertheless unquestionable fact, as all law reporters can testify, that judges and counsel of great legal experience have very frequently very little idea of what constitutes 'reportability' in a case. A remark made by the Lord Chief Justice in the Exchequer Chamber lately, as reported in the *Times*, illustrates this very forcibly. His lordship is stated to have complained of the fact that out of seven cases set down as errors from the Exchequer, only one had as yet been reported, and to have said that it was of great importance in dealing with cases in courts of error that the court should have a report of the arguments and judgments in the court below. We venture to think that an experienced and competent law reporter would say that a more complete misconception of the true function of law reporting could hardly exist. We suspect that it is not a case of delay in publication, as suggested, and that in truth the cases referred to never will appear in the *Law Reports*, because they are not cases

LAW REPORTING.

involving sufficient novelty of principle to be worth reporting. This is a mere conjecture, but it is apparent that the test applied by the Chief Justice gives the go-by to the proper considerations which govern the question whether a case should be reported.

The reason assigned by the Chief Justice why the cases ought to have been reported, and why the not being reported it is ground of complaint, is that it would have been very convenient for the judges constituting the court in error, in deciding the cases in error, to have had an account in print of the argument and judgments below. Very probably it would, but it is quite obvious that this is no reason for reporting a case. If this consideration is to prevail, every case must be reported, for it is quite impossible to know which may go to error. The reports are not official publications; they are paid for by the consumer, the general legal public; why should they pay for the printing of a quantity of otherwise useless material in order to facilitate the decision by the judges in error of cases only interesting to the parties concerned? It is very proper that by shorthand writers' notes, or otherwise, the turn the case took below should be brought before the judges in error. That this knowledge should be possessed by them is no reason whatever why the case should appear in any series of law reports.

Speaking roughly, there are two classes of cases which are worthy of being reported. First, cases which decide a new point or principle, such as those which settle the meaning of a statute which has not yet received a construction, where such construction was really doubtful in the absence of decision; or which lay down the rule of expediency to be applied to some new combination of elements in social, commercial, or political existence which the course of events brings forward. Secondly, cases which, though they do not decide absolutely new points or principles, nevertheless afford typical illustrations of the application of old points or principles to large or frequently recurring classes of instances. There is nothing, we believe, which darkens counsel so effectually as loading the books with cases in which, though much was mooted, very little or nothing was decided. An *obiter dictum* is, as a rule, better suppressed. A

system in which previous decisions have the force of law has its drawbacks, though it seems to us that the advantages more than counterbalance them; but anything which tends to give mere *dicta* the force of precedents is, to our thinking, mischievous. The tendency of modern reporters is to confine the matter reported to the actual decision much more strictly than was the practice in former times, and we feel sure that the profession ought to support them in this respect.

There is no doubt a very frequent and natural tendency on the part of a lawyer who is getting up the argument of a case to welcome considerable prolixity in the reporter, and the diligent recording of loose speculative opinions, not strictly necessary to the decision of the case reported. Such a mode of reporting frequently affords padding for an argument to a counsel with a bad case, and, even if the counsel has the right on his side, it is more convenient for him to dilute his arguments to the volume which the fee may necessitate with the water of a judge's conversational expressions of opinion, reported at unnecessary length, than with observations of his own. The question, however, is not to be judged from this point of view, but from that of the general legal public who have to pay for the printing and to keep up with the constant aggregation of legal material. Law reformers constantly complain of the enormous mass of confusion which constitutes our English law, and aver that the grain of wheat lies imbedded in colossal heaps of chaff. The rapidity with which the yearly accretions of the *Law Reports* fill up the shelves of any library not of Brobdingnagian proportions is an appalling phenomenon. It makes one sigh on considering the lot of our grandchildren who commence the study of law.

Seriously speaking, the unnecessary accumulation of printed matter upon the world is a great evil in any branch of learning. It is particularly so with regard to the reports of decided cases, where it tends greatly to increase labour and confusion. It is extremely desirable that a severe rather than a lax rule should prevail, as to what amounts to 'reportability' in a case, and for this reason we were sorry to observe the remarks of the Chief Justice reported in the *Times*.—*Solicitors' Journal*.

Practice Court.]

IN RE TOWNSHIP OF HOWICK & VILLAGE OF WROXETER.

[Ontario.]

CANADA REPORTS.

ONTARIO.

PRACTICE COURT.

IN THE MATTER OF THE AWARD BETWEEN THE
TOWNSHIP OF HOWICK AND THE VILLAGE
OF WROXETER.

*Municipal Act 1873, sections 25, 295—Arbitration—
Power of Arbitrators—Reference back.*

Two Municipalities having failed to agree as to the disposition of certain property and liabilities between them, an arbitration was had pursuant to sub-sec. 5 of sec. 25 of Municipal Act of 1873. The Arbitrators decided that the principle expressed in sub-sec. 4 of sec. 25, that the amount to be paid by one corporation to the other should be "such sum of money as may be just" had reference only to a fair equalization of the assessment of the Municipalities and that no other consideration should be regarded.

Held, 1. That although by the general law this award could not be impeached, as there was nothing wrong either of fact or of law on the face of the award, the Court must, nevertheless, when its interference is invoked under sec. 295, enter into the merits of the matters submitted.

2. That the arbitrators should have taken into consideration such other circumstances as they might have thought just, so as to arrive at an equitable settlement between the Municipalities. The award was therefore remitted to the arbitrators to award what they might find to be under all the circumstances just between the parties, upon a liberal and comprehensive interpretation of the statute.

[Practice Court—Mich. Term, 1875, and
Jan. 7, 1876—Wilson, J.]

In Michaelmas Term *Francis* obtained a rule calling on the Township of Howick to show cause why the award made between the above corporations should not be set aside, or why the matters in question between the parties should not be referred back to the arbitrators named in said award, on the ground that the arbitrators, according to their admissions in writing filed on this application, assumed to determine the respective rights and liabilities of the respective corporations with reference to the real and personal property and debts of the union, having regard only to the relative populations as to the asset assignment of the provincial surplus distribution and to the relative assessment as to the railway liabilities mentioned in the award, whereas the arbitrators were bound under the provisions of the Municipal Act to take into consideration all such material matters as would enable them to make a just award between the parties in the premises.

The arbitrators were Alexander Shaw, Barrister, elected by the Township of Howick, David Davidson Hay, M.P.P., elected by the Village of Wroxeter, and these two elected Isaac Francis Toms, Junior Judge of Huron, as the third arbitrator.

The award was made by Mr. Toms and Mr. Shaw—Mr. Hay not concurring in it.

The two arbitrators found

(1.) That the personal property of the Township at the time of the separation of Wroxeter from it consisted of

(a) The amount coming to it from the Province on account of the Municipal Loan Fund surplus distribution \$5,372 80

(b) The amount coming to it from the Province on account of the Land Improvement Fund, which fund is payable from time to time upon the sale of the Government lands in the Township, and which fund is capitalized by the award at \$7,500 00

\$12,872 80

(2.) That Howick owed at the time of the separation

(a) The amount due on account of debentures issued in aid of the Toronto, Grey and Bruce Ry. Co. \$15,000 00

(b) The amount due on debentures issued in favour of the Wellington, Grey and Bruce Ry. Co. \$11,000 00

\$26,000 00

(3) That of the above sum of \$5,372 80

they apportioned to Wroxeter, \$646 44 being a sum made on the basis of population of the two Municipalities. (The remainder or \$4,726 36 goes, of course, to Howick.)

\$5,372 80

And of the above sum of \$7,500 00 they apportioned to Wroxeter

\$50 00 being a sum made on the basis of the acreage of the two Municipalities, (and, of course, giving to Howick the residue or

\$7,450 00

\$7,500 00

Practice Court.]

IN RE TOWNSHIP OF HOWICK & VILLAGE OF WROXETER.

[Ontario.]

thus giving to Wroxeter

out of these two sums... \$696 44

(4.) That of the above sum of \$15,000 00 they awarded that the sum of

\$975 00 should be paid by Wroxeter, (and, of course, that the residue

\$14,025 60 should be paid by Howick.

\$15,000 00

And of the above sum of..... \$11,000 00 the sum of

\$715 00 should be paid by Wroxeter, (and the remainder of

\$10,285 00 by Howick.)

\$11,000 00

Making together the sum to be paid by Wroxeter..... \$1,690 00

The apportionment being made upon the basis of the equalization of the value of the real and personal property of the two Municipalities.

\$696 44

(5.) That Wroxeter should pay to Howick the sum of..... \$993 56

being the difference between Wroxeter's share of personal property, and its indebtedness with interest at 6 per cent. from the 24th December, 1874, in ten equal annual instalments of \$99.36 each. The first instalment of principal and interest to be paid on the 1st of January, 1877.

(6.) That Howick should retain the two sums of \$3,372.30 and \$7,500, and it should pay the two sums of \$15,000 and \$11,000.

(7.) The costs of arbitration and award were \$259.25, which Howick should pay, and Wroxeter shall pay to Howick one half of such sum.

The arbitrators did not take into consideration certain matters brought before them in reference to a sectional bonus granted by Wroxeter and the unincorporated Village of Gorrie in aid of the Toronto, Grey and Bruce Ry. Co., not considering the same within the scope of the reference.

The three arbitrators made a written statement to the effect that they held that the principle expressed in the Municipal Act 1873, sec. 25, sub-sec. 4, that they should award "such sum or sums as may be just" had refer-

ence only to a fair equalization of the assessment of the Municipalities and to be determined only on that basis without regard to other considerations. The award was made on that application and view of the statute, and would, as to the distribution of liabilities, have been somewhat different if made on the view of the statute contended for by Mr. Hay, namely, that the arbitrators were entitled under the clause of the statute in question, to take into consideration not only the question of the assessment as a basis of the distribution of liabilities and assets, but any other fact, cause or consideration having any relation to or bearing on the position and obligations of the respective Municipalities.

In a separate statement Mr. Toms says:—

"I take this view of the matter that it is simply the duty of arbitrators to ascertain the amount of the indebtedness of the union, the value of their assets, and then to apportion the same according to the value of the property, real and personal, liable to assessment in the two new Municipalities. The award made by Mr. Shaw and myself, in which Mr. Hay did not concur, was based upon this principle. We arrived at the debt of the union, equalized the assessment of the two portions, and divided the debt. The assets we arrived at in the proportion of the population, the only assets being (with the exception of the Land Improvement Fund) the Municipal Loan Fund distribution. As to the Land Improvement Fund, we divided it according to acreage. I understand that all the arbitrators agreed as to facts."

He says there were two debts—the railway debts. The evidence, clearly showing that so far as the Wellington, Grey & Bruce Railway debt is concerned, the building of that road was an injury instead of a benefit to Wroxeter. He continued: "And did I consider that was a circumstance to be taken into consideration I should be inclined to relieve Wroxeter from the payment of any portion of the debt. But I cannot see that by the new incorporation Wroxeter can be relieved of that liability. It was suggested by Mr. Hay that if my view of the statute is the correct one there would be no use of an arbitration, as all that would require to be done would be to equalize the assessment of the real and personal property, and then distribute the assets and liabilities accordingly. I can fancy plenty of cases in which arbitration would be required, for instance the assets of the union might be of an uncertain value, and the equalization itself is an important and difficult matter."

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IN RE TOWNSHIP OF HOWICK & VILLAGE OF WROXETER.

[Ontario.]

Crooks, Q. C., in the absence of the counsel for the Township, supported the rule. Where there is a mistake on the face of the award the court may grant relief: *Russell on awards* 67; *Hogge v. Burgess*, 3 H. & N. 293. *Nichols v. Chalie*, 14 Ves. 255. So also when the arbitrators admit they have made a mistake in law or of fact. They have done so in this case by the statements which they have made in writing, giving the grounds of, and reasons for their award, which show they have not conformed to the directions of the statute by determining the matter submitted to them in such manner as "may be just." They say if they had possessed the power they would have thought it just to relieve Wroxeter from all liability for the Wellington, Grey & Bruce Railway debt, because the railway had not only not benefited the village, but had been an injury to it. All that is desired is that the arbitrators shall not bind themselves by so narrow a rule as they have thought they were obliged to conform to. The case of *In re Dare Valley Railway Co.*, L. R. 6 Eq. 429, is very applicable here.

Robinson, Q. C., showed cause to the rule. The village of Wroxeter has no right to be exempted from any part of the debts of the township incurred before the separation. The general debt must be assumed to have been for the general benefit of the whole township. Wroxeter has suffered no more by the debts than any other portion of the township. It is not just, therefore, that the village should be relieved as it now claims to be. But however that may be, more cannot be said by the village than that the arbitrators have made a mistake, either in fact or in law, in making their award, and it is well settled that in any such case the Courts will not interfere with the jurisdiction which has been exercised: *Dinn v. Blake*, L. R. 10 C. P. 388. In the case cited on the other side the arbitrator had exercised his powers: (*Robinson & Joseph's Dig. Tit. Arbitration and Award*, p. 161; *Russell on Awards*, 294, 295;) *Holgate v. Villeck*, 7 H. & N., 418. (This last case explains *Hogge v. Burgess*, 3 H. & N. 293, cited on the other side; *In re County of Middlesex v. Town of London*, 14 U.C. Q.B. 334; *County of Wellington v. Township of Wilnot*, 17 U.C. Q.B. 71; *In re United Counties of Northumberland and Durham v. Town of Cobourg*, 20 U.C. Q.B. 283.

Jones, for the village of Wroxeter, contended there should be no difference between a case of arbitrators deciding upon what they had no

jurisdiction to deal with, and of their not fulfilling the powers they were entrusted with.

Crooks, at a later day, referred to the Municipal Act, 1873, sec. 295, showing that the Courts are not so strictly bound in dealing with awards made under that Act as they are in dealing with awards in general.

WILSON, J. The general rule is that the Court will not look at anything for the purpose of reviewing the decision of the arbitrator upon the matter referred to him, except at what appears on the face of the award, or in some paper so connected with the award as to form a part of it, and a letter subsequently written by the arbitrator forms no part of the award: *Holgate v. Putrich*, 17 H. & N. 418. But if the arbitrator himself admit he has made a mistake in the legal principle on which his award is based, the Court will interfere: *Dinn v. Blake*, L. R. 10 C. P. 388.

If I had to determine this application upon the general law I think I could not interfere, for there is nothing wrong either of fact or of law on the face of the award. And although the arbitrators have stated by a writing the grounds of their decision—and have shown that they would have decided differently in some respects if they had been at liberty to do so—yet that writing, not being contemporaneous with nor forming any part of the award, could not be looked at nor considered. And even if it could, the arbitrators do not admit they have made any mistake, but on the contrary maintain they have well and rightly decided according to their view of the law.

But I have to deal with this award under the special provisions of the Municipal Act to which Mr. Crooks has directed my attention, and which were not present to my mind on the argument, and they were not then referred to on either side, but I should of course have referred to the special source of power under which the award was made and by which it had to be judged before giving my final opinion. I have had occasion to deal with these enactments at different times, as they have been for very long an important part of the municipal law.

The 295th section declares that every award under the Act shall be in writing and shall be under the hands of all or of two of the arbitrators, and shall be subject to the jurisdiction of any of the Superior Courts of law and equity, as if made on a submission by bond containing an agreement for making the submission a rule or order of such court, and in the cases provided for in the 293rd section (and this case is

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within that section, for it is an award under the Act, which does not require adoption by the Council), the Court shall consider not only the legality of the award, but the merits as they appear from the proceedings so filed as aforesaid (that is, filed under the 293rd section with the clerk of the Council), and may call for additional evidence to be taken in any manner the Court directs, and may, either without taking such evidence or after taking such evidence, set aside the award or remit the matters referred, or any of them, from time to time, to the consideration and determination of the same arbitrators, or to any other person or persons whom the Court may appoint, as provided in the C. L. P. Act, and fix the time within which such further or new award shall be made, or the Court may itself increase or diminish the amount awarded or otherwise modify the award as the justice of the case may seem to the Court to require.

I think it is my duty under that enactment to enter into the *merits* of the matters submitted, and that I must deal with "the award as the justice of the case may seem to the Court to require," and, as I have power to "call for additional evidence," I may act upon the written statements of the arbitrators, although they are not part of nor contemporaneous with the award.

Then what should the arbitrators have done under sec. 25, sub-sec. 4, which directs in the case of these two municipalities which were separating, that "the one shall pay or allow to the other in respect of the said disposition of the real and personal property of the union and in respect to the debts of the union, such sum or sums of money as may be just?"

Were they bound to apportion the debts and assets of the union according to the value of the property, real and personal, liable to assessment in the two municipalities, and according to population and acreage, as they have done? Or could they not take into consideration other circumstances which they might think just between the two bodies in order to make an equitable settlement between them? I certainly think they could have done so, and that they were not, nor are bound down so rigidly as they thought they were. And the Court may deal in the like manner with the rights and liabilities of the respective bodies upon a review of the merits of the case after the award has been made.

The claim of the village to a share of the sum of \$5,372 80 has been decided upon the basis of

population, which is, I suppose, sanctioned by the 37 Vict., c. 47, sec. 2.

The claim to a share of the \$7,500 is based on the extent of acreage in the two municipalities. That may or may not be a fair way of apportioning it. I have not the means of determining it before me, and I do not think it has been complained of.

A village might happen to require a larger allowance from such a fund than mere farms or wood land. And it might happen that the site of the village might be especially in want of drainage, while most of the other parts of the township might not require it. These are special and purely local matters with which I cannot now deal.

Then the liabilities for the railway debentures, amounting in all to \$26,000, have been apportioned according to the respective assessments of real and personal property in the two localities, and it is against that adjudication which the village chiefly, if not altogether, complains.

The village says the debentures given to the Wellington, Grey & Bruce Railway Company of \$11,000, and for which the village is charged \$715, should be struck off altogether from the village as a debt because the construction of that railway has been a serious injury to the village. And the arbitrators say they would have so struck it off, if they had felt at liberty under their rights, powers and duties as arbitrators to have done so.

As I have already said, I think they had the power to deal with these debts and assets in a different manner and in a more liberal spirit than they have done, and that they could, if they were of opinion the facts and evidence justified them, have disallowed that charge against the village on the ground that it was *just* to do so.

I can form no opinion at present whether the portion of the \$26,000, or of either of the sums composing that amount, now debited to Wroxeter, should or should not—or one or the other of them—in whole or in part, be struck off from the liabilities of the village. It is not a matter of abstract reasoning in any respect that can determine such a question.

It does not follow that the village should be relieved from such a claim because it has not been benefited by the grant made or by the road established.

It may be the township would not have granted the bonuses if the village, as a part of the township, had not been looked upon by the

Practice Court.] IN RE HOWICK V. WROXETER—REGULE GENERALES.

other parts of the township as a contributory, although an unwilling one, to the work. And while the township is a unit, the component parts of it must be governed for the good of the whole. And yet the village property and business—which are, of course, very different from merely rural sections—may have been so depreciated by such works that it would not be reasonable to burden the village with such a claim at all, or at most with a very small portion of it.

The course of trade and travel to and into the village may happen to lie in quite a different direction than that in which the railways, or one of them, may be located, or to or from which they may lead. Another village about the railway station may have sprung up which may have supplanted Wroxeter as the chief village in the township. And it might be just for the general and great gain which the township had made by the railway that it should assume the whole or the greater part of the debt, and relieve such a portion of the township as Wroxeter, which had been injured by the road, from payment of the debt in whole or in part.

Certainly the township cannot tax those still in the township in the proportion in which they have been benefited by these roads. Some persons must be much more benefited than others are, and some persons must be in no way benefited, as well as those who are residents of Wroxeter.

If Wroxeter had been instrumental in carrying the by-law for the bonus, probably that would be a good reason for not relieving it from its share of the debt, or it might be a sufficient reason for charging it with more than what would have been its ordinary share.

In this case the village was against the bonus to the Wellington road, but it was in favour of the Toronto road. As to the latter road, I think it is not objected that it should not pay its quota for it. It may perhaps be argued that it should pay somewhat more than its share, as determined by the assessment returns.

However the arbitrators may deal with these matters, I need not now speculate. It is quite sufficient to say that the award should be remitted to the same gentlemen, who are competent to deal with these questions, and in whom the parties have perfect confidence, in order that they may deal more fully with the rights and liabilities of these respective bodies, by doing what is *just*, that is, fair and equitable between them according to the circumstances of the case, upon a liberal and comprehensive interpretation of the statute, and that the new

award so to be made by the said arbitrators shall be made on or before the first day of February next.

The rule will be absolute remitting the award to the said arbitrators.

Award referred back to arbitrators.

COURT OF QUEEN'S BENCH AND COMMON PLEAS.

REGULE GENERALES.

Whereas, it was enacted by sec. 134 of the C.L.P.A., 1856, that the record of *Nisi Prius* should not be sealed or passed; and whereas, in consequence, the practice in England as to making up and delivering paper books and issue books was introduced by Rule No. 33 of the General Rules as to Practice of Trinity Term, 1856; and whereas, afterwards by section 203 of chapter 22 of the Consolidated Statutes of Upper Canada, it was provided that the record of *Nisi Prius* need not be sealed, but shall be passed and signed as therein declared; and whereas, in consequence of the last-mentioned enactment it has become expedient to rescind the Rule No. 33 of the General Rules of Trinity Term, 1856, and to make provision as herein-after mentioned. It is therefore ordered:—

1. That Rule No. 33 as to Practice, of Trinity Term, 1856, shall be, and the same is hereby rescinded.

2. That the practice in England as to making up and delivering paper books and issue books, for the purpose of settling the same, is not to be followed in future.

3. That all rules or orders inconsistent with this rule shall be, and the same are hereby rescinded.

4. That this rule shall take effect on and after the second Monday of the present Term of Hilary.

The following Rules were also promulgated:—

REGULE GENERALES.

It is ordered as follows:—

1. That when any case shall be transmitted by a Court of Oyer and Terminer, or Gaol Delivery, or General Sessions, for the consideration of the Justices of the Courts of Queen's Bench or Common Pleas of Ontario, the original case signed by the Judge or Chairman of Sessions

REGULE GENERALES—FLOTSAM AND JETSAM.

reserving the question or questions of law, and three copies of such case, one for each Judge, shall be delivered to the Clerk of the Court at least four days before the day appointed for the argument, unless otherwise ordered by the Court.

2. That every case transmitted for the consideration of the Court shall briefly state the question or questions of law submitted. If the question or questions turn upon the indictment, or any count thereof, then the case must set forth the indictment or the particular count.

3. That every case must state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution.

4. That whenever a case is sent back for amendment the same shall be re-argued as regards the matter amended, unless the Court otherwise order.

5. That the original case as amended, and three copies thereof, or only of the amended portion or portions thereof, if the Court so order, shall be delivered to the Clerk of the Court at least four days before the day appointed for the re-argument, unless otherwise ordered by the Court.

6. That on every such argument or re-argument as aforesaid, the counsel for the prisoner or defendant shall have the right to begin and reply, unless the Court otherwise order.

7. That these rules shall take effect forthwith.

Osgoode Hall, Hilary Term, Monday, 7th February, 1876.

(Signed)

JOHN H. HAGARTY,
ROBT. A. HARRISON,
JOS. C. MORRISON,
ADAM WILSON,
JOHN W. GWYNNE,
THOMAS GALT.

FLOTSAM AND JETSAM.

A CONSTITUTIONAL DIFFICULTY.—The people of the Isle of Man are profoundly agitated. They say that they are about to be deprived of liberty of speech, and that the press is to be muzzled. The liberty of the subject is in imminent peril. *Magna Charta* is to be a dead

letter, and the *Habeas Corpus* a useless enactment. The terrors of the Inquisition and the iniquities of the Star Chamber are to be revived in the Isle of Man. If the Queen in Council assents to the Tynwald Court Bill, Manxmen will be slaves until they are delivered from the abolition of Home Rule.

As some of our readers may not know the Isle of Man system of government, a few words of explanation are desirable. There are two branches of the Legislature. The Council is the Upper House, and its members are Crown nominees. The meetings of the Council are private. The House of Keys, the Lower House, is elected by the people, and its meetings are not private. We may here remark that the Executive is permanent, and independent of the vote of the Keys. The Tynwald Court is constituted by the members of the Council and the members of the Keys. A Bill "to regulate certain proceedings in the Court of Tynwald" has been passed, and section 5, which provides for the punishment of contempt of Court, runs thus: "The Court and each House shall have power to punish contempts by fine and imprisonment, or by both, in like manner as any superior Court of Justice has power to punish contempts. Any contempt of a committee may, in the discretion of the House, be deemed to be a contempt of the Court or House by whom such committee may have been appointed: provided always that, in the case of a contempt of either House, the cause of contempt shall be set forth in the warrant or order awarding the punishment for such contempt; and provided, also, that no fine to be imposed shall exceed the sum of £300, nor shall any imprisonment exceed the term of six calendar months." We gather from a report of the proceedings in the Keys that the maximum fine is reduced to £100, and the maximum term of imprisonment to three months; but the clause is given as above in the memorial presented, or about to be presented, to the Home Secretary. It is this fifth clause that has alarmed and incensed Manxmen.

By the House of Keys Election Act, the House has authority to punish for contempts committed in its presence. We are disposed to agree with those who think that it is an improper limitation. A flagrant contempt might be committed not in the face of the House. Suppose it was stated in a newspaper, or at a public meeting, that the House of Keys was corrupt, and that it was selling its votes. Is that a contempt to be allowed because it is not committed in the face of the House? The news-

FLOTSAM AND JETSAM.

paper proprietors, in their memorial to the Home Secretary, say that the existing criminal and civil law of the island is perfectly adequate to deal effectually with any possible offence which the press can commit. But that is not the point. The memorialists do not object to the House of Keys having jurisdiction to punish for contempts committed in its presence, and it is for them to show why there should be a distinction between the contempts committed in the face of the House and those committed not in the face of the House. In the debate in the Keys, Mr. W. Farrant proposed as an amendment that, in case either House is libelled or aggrieved, the matter should be referred to the Tynwald Court, and the judgment given and the sentence awarded by that Court. This amendment was rejected, on the ground that, inasmuch as the House of Lords or the House of Commons did not allow its dignity to be compromised by having to consult each other about a contempt, it would be undignified and dangerous for the Keys to be in the power of the Council, or the Council in the power of the Keys. An amendment to leave the amount of the fine and the duration of the imprisonment to the discretion of the offended House, was rejected; and certainly it is better for offenders that the discretion should be limited. Mr. La Mothe delivered a speech that is calculated to alarm the press. He objects to the press commenting on pending bills. He says that if there is an objection to a bill, the objector should present a petition to the House, and that comments in the press should not be permitted. If the Tynwald Court Bill is passed, and the House adopts the view of Mr. La Mothe, the Manx press will not be able to discuss any political question. That would be an absurd and reprehensible interference with the liberty of the press. What is the remedy? The memorialists ask that Her Majesty may be advised to withhold her assent from the bill until clause 5 has been expunged; but that would be rather a strong violation of constitutional etiquette. The bill is approved by the Executive, it was adopted by the Council, and it was passed in the Keys, with clause 5, by a majority of sixteen to three. Fancy the Queen being asked to veto a bill introduced by the Government, passed by the Lords, and also passed in the Commons by a four-fifths majority!

The proper remedy is in the abolition of the attempt to adapt an Imperial system of government to the government of an island thirty miles long by twelve miles broad, with a popu-

lation of 20,000. A number of people, about the fifth of the population of the borough of Finsbury, have two Houses of Parliament and a High Court—the Court of Tynwald. We agree with the memorialists, who say that “it would be indeed dangerous in the extreme to invest a subordinate legislature, in a small place like the Isle of Man, with such a power as is now claimed.” But if there is to be a legislature, it should have the rights and privileges of a legislature. What is now happening in the Isle of Man has happened in Greece and other small communities, where the British Constitution has been tried. The machinery of government that works well in an ancient and populous kingdom will not do in other places. We see the practical objection to clause 5 when it is read in connection with Mr. La Mothe's views of contempt. But we could not, as lawyers advising on a constitutional question, support the request of the memorialists, that the Queen should be advised to refuse her assent to a bill approved by the Executive and passed in the House by overwhelming majorities.—*Law Journal*.

AN AGED SUIT.—Some scientific inquirers have doubted whether any man or woman has ever lived for one hundred years. Whatever scepticism may exist as to the duration of human life, no one can contest the possibility of a suit in chancery lasting for 135 years. The fictitious suit of *Jarndyce v. Jarndyce* has been eclipsed by the real suit of *Ashley v. Ashley*. This glory of equity jurisprudence first saw the light in 1740, when Lord Hardwicke held the Great Seal. The Master in Chancery reported on it in 1792, the year in which Lord Thurlow was finally driven from office, exchanging the Chancery and the mace for Bath and the gout. From that memorable epoch the suit slept; but, as in Rip Van Winkle's case, the spark of life was not extinct, only dormant, and the suit reappeared in the year of grace 1875, on November 19, before Vice-Chancellor Sir Richard Malins. The long torpor under which it had been oppressed had given it new strength, and when it awoke its giant form so affected his Lordship that, in passing judgment, the Vice-Chancellor recommended that the suit should at once be removed into the Court of Appeal for final adjudication. In looking back upon the history of this suit the greatest marvel is that Lord Eldon had no hand in promoting its longevity, and the next greatest marvel is that the Judicature Act will prove the weapon of its

FLOTSAM AND JETSAM—CIRCUITS.

final destruction. There is, however, one fact in its career which must fill the profession with unalloyed pleasure. The costs have been paid from time to time out of the fund, and it is quite delightful to observe that the Vice-Chancellor wound up his judgment on the point before him with these refreshing words: "Tax and pay the costs of all parties out of the funds in Court."—*Law Journal*.

THE oldest judge in England is the Right Hon. Sir Fitzroy Kelly, Lord Chief Baron of the Court of Exchequer, aged 80; the youngest, the Right Hon. Sir George Jessel, Master of the Rolls, aged 52. The oldest judge in Ireland is the Right Hon. James H. Monaghan, Chief Justice of the Court of Common Pleas, aged 72; the youngest, the Right Hon. Christopher Palles, J.L.D., Chief Baron of the Court of Exchequer, aged 45. The oldest Scotch Lord of Session is Lord Neaves, aged 76; the youngest, Lord Shand, aged 47.—*Ec.*

COMMON LAW SPRING CIRCUITS
1876.

EASTERN CIRCUIT—HON. MR. JUSTICE GALT.

Perth	Tuesday	14th March.
Cornwall	Tuesday	21st March.
Ottawa	Tuesday	28th March.
L'Orignal	Tuesday	2nd May.
Pembroke	Tuesday	9th May.

MIDLAND CIRCUIT—HON. MR. JUSTICE BURTON.

Belleville	Tuesday	28th March.
Kingston	Monday	10th April.
Napanee	Monday	17th April.
Brockville	Tuesday	25th April.
Picton	Tuesday	9th May.

BROCK CIRCUIT—HON. MR. JUSTICE PATTERSON.

Woodstock	Monday	27th March.
Owen Sound	Monday	10th April.
Goderich	Monday	17th April.
Stratford	Monday	24th April.
Walkerton	Monday	8th May.

VICTORIA CIRCUIT—HON. MR. JUSTICE MOSS.

Peterborough ..	Tuesday	28th March.
Lindsay	Tuesday	4th April.
Cobourg	Tuesday	18th April.
Whitby	Thursday	27th April.
Brampton	Tuesday	9th May.

NIAGARA CIRCUIT—HON. MR. JUSTICE WILSON.

Cayuga	Wednesday	22nd May.
Welland	Tuesday	28th March.
St. Catharines ..	Monday	3rd April.
Milton	Monday	17th April.
Hamilton	Monday	24th April.

WATERLOO CIRCUIT—HON. MR. JUSTICE
GWYNNE.

Guelph	Tuesday	21st March.
Berlin	Monday	10th April.
Barrie	Tuesday	18th April.
Simcoe	Tuesday	2nd May.
Brantford	Monday	8th May.

WATERLOO CIRCUIT—HON. MR. JUSTICE MORRISON.

London	Monday	20th March.
St. Thomas	Monday	3rd April.
Chatham	Monday	10th April.
Sarnia	Monday	24th April.
Sandwich	Monday	1st May.

HOME CIRCUIT—CHIEF JUSTICE OF THE COMMON PLEAS.

Toronto, (Assize and Nisi Prius), Tuesday, 14th March
Toronto, (Oyer and Terminer), Tuesday, 18th April.

N.B.—There shall be in York a jury list and a non-jury list. The former list shall be first disposed of, and the latter not taken till after the dismissal of the jury panel, unless otherwise ordered by a Judge.

The Chief Justice of Ontario will remain in Toronto during the Spring Circuits, to hold the weekly sittings of the Superior Courts of Law, and to act as Judge in Chambers.

CHANCERY SPRING CIRCUITS.

THE HON. THE CHANCELLOR.

Toronto	Monday	March 13th.
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THE HON. THE CHANCELLOR.

HOME CIRCUIT.

St. Catharines ..	Thursday	March 30th.
Hamilton	Tuesday	April 4th.
Brantford	Thursday	April 13th.
Simcoe	Wednesday	April 19th.
Guelph	Tuesday	April 25th.
Owen Sound	Thursday	May 4th.
Barrie	Tuesday	May 9th.
Whitby	Tuesday	May 16th.

THE HON. VICE-CHANCELLOR BLAKE.

WESTERN CIRCUIT.

Stratford	Wednesday	March 29th.
Goderich	Tuesday	April 4th.
Woodstock	Monday	April 10th.
Sarnia	Tuesday	April 18th.
Sandwich	Thursday	April 20th.
Chatham	Friday	May 19th.
London	Friday	May 26th.
Walkerton	Tuesday	June 6th.

THE HON. VICE-CHANCELLOR PROUDFOOT.

EASTERN CIRCUIT.

Lindsay	Tuesday	April 25th.
Peterborough ..	Monday	May 1st.
Cobourg	Monday	May 8th.
Belleville	Monday	May 15th.
Kingston	Monday	May 29th.
Brockville	Monday	June 5th.
Cornwall	Thursday	June 8th.
Ottawa	Monday	June 12th.

LAW SOCIETY, MICHAELMAS TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOOD HALL, MICHAELMAS TERM, 30TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:
No. 1342—KENNETH GOODMAN.

THOMAS HORACE MCGUIRE.
GEORGE A. RADENHURST.
ERWIN HAMILTON DICKSON.
ALEXANDER FERGUSON
DENNIS AMBROSE O'SULLIVAN.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit.
The following gentlemen received Certificates of Fitness:

THOMAS C. W. HAMLETT.
ANGUS JOHN MCCOLL.
DENNIS AMBROSE O'SULLIVAN.
DANIEL WEBSTER CLENDENAN.
GEORGE WHITFIELD GROTE.
CHARLES M. GARVEY.
ALBERT ROMAINE LEWIS.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates.

No. 2585 GOODWIN GIBSON, M.A.
JOHN G. GORDON, B.A.
WALTER W. RUTHERFORD, B.A.
WILLIAM A. DONALD, B.A.
THOMAS W. CROTHERS, B.A.
JOHN B. DOW, B.A.
JAMES A. M. AIKINS, B.A.
WILLIAM M. READE, B.A.
EDMUND L. DICKINSON, B.A.
CHARLES W. MORTIMER, B.A.

Junior Class.

ROBERT HILL MYERS.
WILLIAM SPENCER SPOTTON.
WILLIAM JAMES T. DICKSON.
WILLIAM ELLIOTT MACARA.
JAMES ALEXANDER ALLAN.
WALTER ALEXANDER WILKES.
WILLIAM ANDREW ORR.
ALFRED DUNCAN PERRY.
JAMES HARTBY.
HERBERT BOLTER.
JOHN PATRICK EUGENE O'MEARA.
CHARLES AUGUSTUS MYERS.
CHARLES CROSSIE GOING.
DAVID HAVELOCK COOPER.
EMERSON COATSWORTH, JR.
WILLIAM PASCAL DROGICIE.
FREDERICK W. KITTERMANTER.

Articled Clerk.

JOHN HARRISON.

Ordered. That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise on Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

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THE Canada Law Journal.

Toronto, March, 1876. Part 2.

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ORDERS OF THE COURT OF APPEAL

LAW SOCIETY OF UPPER CANADA.....

SOME changes are about to be made in the staff in the west wing at Osgoode Hall. It is said that Mr. Grant is to be made Registrar of the Court of Appeal, Mr. Holmstead taking his place as Registrar of the Court of Chancery, and that Mr. R. P. Stephens will be made Referee in Chambers, the business of the Accountant's office being transferred to his department.

We publish on a subsequent page the Rules of the Supreme Court. They have evidently been prepared with great care, and seem to be very complete. One of them provides that an "agent's book" is to be kept, in which all persons practising in the Supreme Court may enter the name of an agent on whom papers

may be served, &c. We notice that an enterprising firm takes advantage of this to advise the profession that they are both able and willing to act as such agents. We have no reason to say that they are not the former; that they are the latter is obvious : nevertheless many will choose other firms in preference.

SHORT-HAND reporters are so commonly engaged in important trials in England that the Judges' notes are not so frequently in requisition there as they are here. But as with us some of the judges there are more liberal than others with their notes. The other day Vice-Chancellor Hall allowed both parties leave to apply for copies, though of course at their own expense. Mr. Justice Quain on the other hand, refused to entrust his notes to either parties, but produced them to the court for the purposes of an appeal. He had possibly some good reason, perhaps his notes may have shown something not intended for the public, or were not "presentable," or he may have been suffering from an attack of dyspepsia, or he might have feared that the person asking to see them intended to mutilate them; but however this may have been, the profession doubtless would make their own observations less complimentary to him than to his brother in the Equity Division.

THE following is the result of the recent examinations held at Osgoode Hall :

CALLS TO THE BAR.

E. D. Armour.	H. C. Gwyn.
R. G. Cox.	A. R. Lewis.
J. R. Metcalf.	J. W. Frost.

ATTORNEYS ADMITTED.

E. G. Patterson, (without oral,)	
R. Pearson.	E. D. Armour.
J. Leitch.	A. E. Smythe.
R. G. Cox.	H. Archibald.
T. C. Johnstone.	J. C. Hegler.
E. P. Clement.	G. A. Cooke.
W. M. Hall.	D. Lennox.

LAW SOCIETY, HILARY TERM—OUR LAW REPORTS.

FIRST INTERMEDIATE EXAMINATION.

D. M. Christie.	F. W. Gearing.
R. W. Keefer.	J. A. M. Aikins.
J. V. Teetzel.	J. Fullerton.
Chester Glass.	E. W. Scatherd.
H. T. Beck.	W. L. Walsh.
(The above without oral.)	
W. Malloy.	J. K. Dowsley
G. T. Shipley.	R. Shaw.
J. A. Wright.	P. C. MacNee.
J. Woodman.	

SECOND INTERMEDIATE EXAMINATION.

A. W. Kinsman.	H. Cassels.
A. H. Marsh.	E. D. McMillan.
(The above without oral.)	
A. C. Galt.	H. J. O'Neil.
T. G. Meredith.	W. M. Sutherland.
J. M. Carthew.	G. P. Hallen.
R. J. Duggan.	J. J. Manning.
L. T. Barclay.	W. J. Hales.

REFERENCE was made, in the *Mercer will case*, to the doctrine of the feudal law, that a child born in wedlock was legitimate, though conceived before marriage. A case was lately decided by Vice-Chancellor Malins (*Re Corlass Estate*, 24 W. R., 204), involving a piece of refinement, wonderfully subtle, modifying this well-established rule. A testator directed the income of one-half of his residuary estate to be paid to his son during his life, and afterwards to his lawful issue. One of the issue was *en ventre sa mère* at the time of the death of the life-tenant, but his parents were not married till after that time, though they did intermarry before the birth of the child. The judge held that the class entitled to the benefit under the will had to be ascertained at the death of the tenant for life; that at that time, though the child was *en ventre sa mère*, yet because of her mother, being then unmarried, the issue could not be called lawful at the period of distribution; and the subsequent marriage before the birth would not so legitimate by retroaction as to entitle the child,

after its birth, to share in the residue. This decision strikes us as an unnecessary piece of casuistry. Marriage should be held to legalize the issue born thereafter for all purposes. The decision, carried out to its logical consequences, would involve an inquiry as to the period of conception. It was said in *Doe v. Clarke*, 2 H. Bl., 401, that a child *en ventre sa mère* was to be considered as born, for all purposes for his own benefit.

OUR LAW REPORTS.

A report was presented last Term to the Benchers in Convocation, suggesting some important alterations in the arrangement with the Law Reporters. The scheme proposed was only partially adopted. It was decided to increase the salaries of the Reporters of the Queen's Bench and Common Pleas, the former to \$1,200 and the latter to \$1,000, and to add \$400 to that of the Editor-in-Chief, making his salary \$2,000. It was also decided (the arrangement with Mr. O'Brien as to the Practice Reports having expired by effluxion of time) to appoint a fourth or supernumerary Reporter, who should report all Practice cases both at Common Law and in Chancery, all Election Cases and County Court appeals, which latter are hereafter to be heard by the Court of Appeal, and probably insolvency appeals, if they are to be brought before that Court. In addition, this gentleman is to be subject to be called on by the Editor-in-Chief to assist the other Reporters when necessary. It is proposed to give him a salary of \$800 per annum. In view of the fact that the reports (with the exception of the Practice reports which are up to time) are nearly a year in arrear, owing to the great increase in the work, it was also advised that an ar-

ELECTION OF BENCHERS.

range should be made whereby early notes of cases would be published in this journal. This would be a great benefit to the profession. The expense would be very trifling, and we shall be glad to facilitate the arrangement.

The difficulties which encompass the subject of law reporting are very great; it is therefore not surprising that there is much doubt as to the efficiency of the scheme which will be in force when the comparatively unimportant changes above mentioned come into force. These difficulties are so great that some prominent men in the profession advocate leaving it to private enterprise, even though this would seem to be a retrograde movement; whilst others argue in the same direction, when they think of the addition to the fees for certificates. We trust, however, that the importance of the subject will ensure its being treated in a comprehensive manner, with that attention to details which is absolutely necessary, but which it is difficult for busy men, however able, to give, when engrossed by more pressing duties.

ELECTION OF BENCHERS

In the first week of April next will take place, pursuant to 34 Vict. cap. 15, the Election of Benchers of the Law Society. An advertisement in another place gives full particulars as to the time, mode and place of election. It also gives the names of the *ex-officio* Benchers in their order of seniority. Thirty have to be elected by the Bar. Of those who were elected five years ago, only fifteen are on the present list, the remainder having been appointed from time to time, pursuant to the Act, by the remaining Benchers. Those now on the roll are as follows:—

Henry C. R. Becher, Q.C., London.
 Kenneth McKenzie, Q.C., Toronto.
 Stephen Richards, Q.C., Toronto.
 David B. Read, Q.C., Toronto.
 John Crickmore, Toronto.
 Robert Lees, Ottawa.
 M. C. Cameron, Q.C., Toronto.
 Daniel McMichael, Q.C., Toronto.
 John Bell, Q.C., Belleville.
 John D. Armour, Q.C., Cobourg.
 Thomas Moore Benson, Port Hope.
 D'Alton McCarthy, Q.C., Barrie.
 Timothy B. Pardee, Sarnia.
 William R. Meredith, London.
 James Shaw Sinclair, Goderich.
 James MacLennan, Q.C., Toronto.
 James A. Henderson, Q.C., Kingston.
 Andrew Lemon, Guelph.
 John T. Anderson, Q.C., England.
 Edward Martin, Hamilton.
 Clarke Gamble, Q.C., Toronto.
 Thomas Robertson, Q.C., Dundas.
 Thomas Hodgins, Q.C., Toronto.
 Æmilus Irving, Q.C., Hamilton.
 James Bethune, Toronto.
 B. M. Britton, Kingston.
 J. G. Currie, St. Catharines.
 F. Osler, Toronto.
 Hector Cameron, Q.C., Toronto.

The selections which the Benchers have from time to time made are, with one exception, unobjectionable, and have shewn that they were actuated by a desire to obtain useful men, and to pay due regard to a representation as to locality; and though, in our opinion, this latter is a matter of small moment, as we should endeavour to get the *best men*, it cannot be entirely overlooked.

It is not probable that there will be any great change in the above list. Mr. Anderson has, we understand, expressed his intention of not returning to Canada, and Mr. Currie has recently put himself without the pale. Many of the local Bars will in all probability make known to their brethren those whom they wish to be their representatives, and should this selection be made in a fair spirit, it will carry great weight with their brethren in other places.

We have heretofore expressed a mis-

SLANDERING THE JUDGES.

giving as to the ultimate effect of the elective system, but the good sense of the profession in the first election, and the care exercised in the selection of those who have from time to time been appointed to fill vacancies, gives good reason to hope that the evil consequences that we feared are still far in the future.

SLANDERING THE JUDGES.

WE are sorry to notice an occasional insinuation or assertion, sometimes by a public journal, sometimes by a public speaker, as to the fairness of the conduct of some of our judges. It may be remarked that the occasions on which these occur are when party politics are in some way concerned—the logical deduction being, (if there be any foundation for such insinuations,) that where politics come in, the judges allow their sympathies to get the better of them. We might assume (though it would nevertheless be incorrect to do so), that a journal or a speaker making a statement of this nature either believes it to be true, or, knowing it to be false, makes it with a desire to help some political friend, or for some illegitimate purpose. If believed to be true, the charge should be sifted, so that the public may understand whether or not our Bench is what we all in fact know it to be, "*sans peur et sans reproche*"; or, if known to be false, that the slanderer should be branded as one. The good reputation of the Bench is of no less importance to the public welfare than it is dear to its individual members. It is fortunately so immeasurably above suspicion, that it needs no words of ours to keep it bright; but, owing to the extended power and influence wielded by the press in these days, a careless or reckless statement may by its means do harm that is not intended, and destroy that

which cannot easily be built up. Conscious of their own rectitude, and strong in the confidence and high esteem of the Bar and of the intelligent public, our judges can afford to despise all slanders; but neither the Bar nor the public will stand by and see that Bench, of which we are all so proud, maligned, without a protest. Once let an impression get abroad that our judges are not impartial or open to improper influences, then good by to law and order! It is, of course, perfectly competent either for an individual or a journal to criticise sharply the law laid down by a judge; but it is another thing to say (except where the interests of public justice require a plain statement to that effect) that he has been partial in the conduct of a case; and whatever may be the provocation, no man, and especially no professional man, is justified in making either an open or a covert attack upon a judge upon a political platform. A judge moreover from his position is powerless to speak or to write a word in his own defence; and, putting it upon the lowest ground, it is therefore cowardly to attack him. We need not pause to contradict any one of the charges or insinuations to which we now allude; the whole country, including those that made them, know them to be false, in substance and in fact.

A candidate, a lay man, whose election had been set aside, complained recently that justice had not been done him. On another occasion a successful candidate, who is a professional man and the near relative of a late distinguished judge who also had suffered from this kind of slander, under somewhat similar circumstances, unnecessarily and improperly introduced the name of one of the Judges on the Bench into a political discussion, with which the Judge had nothing whatever to do, not only referring to him in a personal offensive manner, but insinuating that he

SLANDERING THE JUDGES—UNANIMITY OF JURY VERDICTS.

gave undue weight to the arguments of certain counsel. Subsequently to this a leading daily paper, in referring to an important criminal trial, used the following language: "It was, moreover, manifest throughout the trial, from first to last, that the counsel for the defence had the ear of the Court, while the counsel for the prosecution received what is on all hands admitted to be somewhat harsh treatment." This is not the language that ought to appear in a journal that claims to be a leader of public opinion, and probably would not have been used but that a political party tinge had been improperly and unnecessarily given to the case. It is something remarkable to hear of counsel for the *prosecution* receiving harsh treatment from the Court, except, indeed, where failure of justice is imminent owing to the incapacity of the Crown Counsel. In this case that was not the danger. The fact was, that there really was no evidence worth the name to go to the jury, except the unsupported story of an admitted scoundrel, whose statements were, in a practical sense, not given under the sanctity of an oath; and it was thought by many that a prosecution, which, the moment the case for the Crown was disclosed, was manifestly hopeless, should not have been persevered in with a pertinacity which would have been commendable, or at least unobjectionable, in the defence, but which was not in accordance with what is considered *en règle* in those who prosecute for our Lady the Queen.

The most recent breach of decency in this matter is the language which is reported, in a local paper, to have been used by a member of Parliament at a recent election meeting in the Niagara District, where this person seconded a resolution, expressing sympathy with, and renewed confidence in one Mr. Neelon, who had been disqualified by Mr. Justice Gwynne, for personal bribery and corruption. The

speaker is reported to have said: "If we had had an impartial judge at the late election protest trial, Capt. Neelon would not have been disqualified." Mr. Gwynne's judgment, as is well known to the profession, was on this part of the case unanimously confirmed by the Court of Appeal. All men may not know that the opinions of this wholesale slanderer, although he is a barrister and a Bencher of the Law Society, as to what is right and proper in professional matters, is not—for reasons with which he is quite familiar—of the smallest moment; but it is of moment that such language has been used by one of whom strangers only know that he is entitled to put M.P. after his name, and was once Speaker of the House of Assembly of Ontario. It is outrageous that a whole Bench of Judges, whose characters are as far above suspicion as this gentleman's is beneath contempt, should be impudently maligned for political purposes.

What is everybody's business is generally nobody's; and it may be that no official notice will be taken of this speech. It may be that one who, it is said, is in imminent danger of having his name struck off the roll of solicitors for not paying over clients' moneys, will be excused for his recklessness in the matter we have referred to; but we doubt whether the true policy is not either to insist upon an ample apology, or to erase his name from a roll which, we trust, contains a large majority of those who are prepared to uphold the dignity of the Bench and the respectability of their order.

UNANIMITY OF JURY VERDICTS.

Mr. Hallam, in his "Middle Ages," speaks of "the grand principle of the Saxon polity, the trial of facts by the country," and expresses the hope that

UNANIMITY OF JURY VERDICTS.

Englishmen may never swerve from that principle, "except as to that preposterous relic of barbarism, the requirement of unanimity."

This "relic of barbarism" has lately been the subject of discussion in the Ontario Assembly. A bill was introduced, the substance of which was, that in civil actions the jury might, after the absence of one hour, return a verdict of eleven of their number; after an absence of two hours, a verdict of ten; and after an absence of three hours, a verdict of nine: and that in any of these cases, the verdict so rendered should have the same effect as a unanimous one. This is not the first time an attempt has been made in the Ontario House to make such an innovation in the jury system. The House treated the proposals with more deference than on a former occasion, but it is not yet prepared for the change, and rejected the bill.

There is no institution which invites attack more than the jury, and at the same time there is no institution which the majority of legislators are so timorous of meddling with. Many sagacious thinkers have strongly pronounced against the rule of unanimity; and it is generally felt that, as Professor Christian says, if the jury system had been established by the deliberate act of the Legislature, no such rule would have formed a part of it. Still, the antiquity of the jury and its acknowledged usefulness, lead men to look with alarm even upon changes in its mode of operation. From an early period, it has been the custom to leave the decision of disputed facts to twelve men chosen indifferently from the community; and with this the custom has grown up of requiring these twelve men to agree before they can render a decision. What experience has sanctioned, as really valuable in this system, is the appeal to a competent number of unprofessional persons. There

is nothing essentially useful in the custom, which has no parallel in any other institution, that the entire tribunal should be forced into holding, or the semblance of holding, the same opinion.

It will be observed that the change proposed by the bill referred to was not intended to extend to criminal cases. Such a limitation was a wise and proper one. In a criminal trial the evidence is either sufficiently clear, one way or the other, or it is involved in doubt. If the latter, that principle of our law, founded on considerations of mercy, that the prisoner should not be convicted where a substantial doubt of his guilt exists, should be allowed due weight. If then there is not unanimity amongst the jurors, if a minority of them are not prepared to find the prisoner guilty, it is consonant with the principles of our criminal law that the opinions of that minority should not be deprived of their influence in the prisoner's favour. The hesitating minority is analogous to the doubt of which the individual jurymen is directed to give the prisoner the benefit. But in civil cases considerations of this sort have no place, and the opinion is gaining ground that it is not only unnecessary, but injurious, to require twelve men to agree, or appear to agree, in order to settle a dispute in a law court. A bare majority of one suffices to enact a law which may be fraught with the most tremendous results to an empire. How absurd it seems that a decision as to rights, which do not affect the interests of more than two private individuals, and that perhaps to the most trivial extent, should require the undivided assent of the full tribunal.

The principal ground put forward by the advocates of the bill in the Ontario House, was that under the present system there is a frequent failure of justice owing to the discharge of juries unable to agree. We are inclined to

UNANIMITY OF JURY VERDICTS.

think this evil somewhat overrated. An appeal to experience will probably show that amongst the great number of cases tried, say in one year, by juries, the proportion of those in which no verdict is returned is very small indeed. The authority of Chief Commissioner Adam, a man who made jury-trial in Scotland his special study for twenty years, is valuable on this point. He says that during the twenty years that he presided at jury-trials at Scotland, only one instance happened of a jury separating after being inclosed for several hours, without agreeing on their verdict. Instances in our own courts are more numerous, but accurate observation would show that they are of less frequent occurrence than is imagined.

The cases which are probably numerous are those in which through the obstinacy of a minority, of one man perhaps, an unjust compromise has been made between the jurors. One of the Ontario members in the recent debate expressed the true evil of the present system, when he reminded the House that the effect of it is too often to compel a juror, sworn to render a verdict in the sight of God according to his conscience, to trifle with his oath by the surrender, or ostensible surrender, of his convictions. Those in favour of the change believe that it will result in a more honest expression of the true opinion of a large majority of the jury than is practically obtained by the present system.

The antiquity of the jury is always appealed to by those who deprecate any meddling with its sacred details. The fact is, that it is when we go back to the origin of the jury that we find the justification for such a change as that in question. As the mover of the bill pointed out, the circumstances under which unanimity came to be required in early days have ages ago ceased to exist.

Mr. Forayth, Q. C., has examined the whole question of the origin of the jury, with much industry and research. His explanation of the origin of the rule requiring unanimity, a rule which he does not hesitate to condemn, is apparently the correct one. He completely disposes of the tradition which represents the jury as being the invention of the Saxon Alfred. The jury cannot be discovered in the form in which we know it prior to the reign of Henry II. The Grand Assize, a tribunal for the settlement of questions affecting the title to land, which was fully developed in the reign of that monarch, and the trial of criminals by invoking compurgators, seem to be the germs out of which our present jury system grew. In trials of these sorts it was necessary to obtain the agreement of twelve men, but not necessarily of the first twelve selected. Dissentients were rejected and jurors added till the necessary unanimity was attained. Moreover, as is well known, the early jurors were nothing but witnesses. From various analogies, the number of twelve came to be looked upon as the necessary number of witnesses to establish the credibility of an accused person, or the existence of certain facts. In a primitive age opinions prevailed as to the quantity of evidence necessary to lead to a decision which more enlightened ages have rejected. For instance, for a long time three or more witnesses were required for the attestation of a will. We are now content with two. So with these juror witnesses, no smaller number than twelve would satisfy the suspicious minds of lawyers in those ignorant times.

The only argument advanced against the principle of the bill in question, which might appear at first sight entitled to weight, was, that the effect of allowing a verdict of nine, ten, or eleven jurors to be equivalent to a unanimous verdict, would

UNANIMITY OF JURY VERDICTS—SUPREME COURT RULES.

be to increase the number of applications for new trials. It was assumed that the verdict of the majority would not carry the same moral weight as that of the twelve, and that the result would be such dissatisfaction as to lead to an increase in the number of motions for new trials. The unsuccessful litigant might possibly be comforted by the fact, that the whole twelve were against him, but it almost always leaks out, that one or more were of a different way of thinking, so that even this comfort is practically denied him. But the question whether a new trial should be moved for, does not depend upon the feelings of a suitor. It depends upon his means, and the advice of counsel. The judges would not be influenced by the fact that three men on the jury had differed from the remaining nine; neither would counsel, and they are supposed to interpret the views which the judges will be likely to hold.

A similar law has been in force in the Province of Quebec since the time of George III., and we are informed on good authority that it has been found to answer well.

Some seventeen years ago, Hon. James Patton introduced, in, the old Legislative Council of Canada, a Bill somewhat similar to that we have been considering. When referring to it at that time, in the pages of this journal, we deprecated any change in the system, especially in view of a then recent alteration in the jury law, and of the too great impatience for change in the legislation of the country, and suggested delay, that the subject might be more fully discussed. There has since then been no lack of impatience, but there has been some useful discussion, and the feeling in favour of doing away with the necessity for unanimity is much stronger now than when Mr. Patton first broached the subject.

The time has come for a careful consideration of this question, and that in the

interest of the whole jury system. The arguments of the present day in favour of the change not only seem to us to outweigh those against it, but there is the additional consideration that some such change would seem desirable to prevent violent hands being laid upon an institution which we deem of too great value to be put in jeopardy.

We have not the least sympathy with those whose avowed object is to get rid of juries altogether. Such persons overlook entirely the great political value of the institution. In giving litigants the choice between trial by jury or by a judge alone, we have gone as far as we ought to go in *that* direction. But we ought not to be afraid of effecting improvements in the jury system, when it is clear that an improvement can be made. We ought to perfect the system in every detail, so that it may be enabled to command popular reverence for all time.

THE SUPREME COURT.

THE following are the Rules made by the Judge of the Supreme Court, providing for the procedure in that Court:—

Appeals.

1. The first proceeding in appeal in this Court shall be the filing in the office of the Registrar of a case, pursuant to section 29 of the Act, certified under the seal of the court appealed from.

2. The case, in addition to the proceedings mentioned in the said section 29, shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the judges of the court or courts below, or an affidavit that such reasons cannot be procured, with a statement of the efforts made to procure the same.

3. The case shall also contain a copy of any order which may have been made by the court

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below, or any judge thereof enlarging the time for appealing.

4. The Court or a Judge thereof may order the case to be remitted to the court below, in order that it may be made more complete by the addition thereto of further matter.

5. If the appellant does not file his case in appeal with the Registrar within *one month* after the security required by the Act shall be allowed, he shall be considered as not duly prosecuting his appeal, and the respondent may move to dismiss the appeal pursuant to sec. 41 of the Act.

6. The case shall be accompanied by a certificate under the seal of the court below, stating that the appellant has given proper security to the satisfaction of the court whose judgment is appealed from, or of a judge thereof, and setting forth the nature of the security, to the amount of \$500, as required by the 31st section of the said Act, and a copy of any bond or other instrument by which security may have been given shall be annexed to the certificate.

7. The case shall be printed by the party appellant, and twenty-five printed copies thereof shall be deposited with the Registrar for the use of the judges and officers of the court.

8. The case shall be in demy quarto form. It shall be printed on paper of good quality, and on one side of the paper only, and the type shall be small pica leaded, and the size of the case shall be *eleven inches by eight and one-half inches*, and every tenth line shall be numbered in the margin. An index to the pleadings, depositions and other principal matters shall be added.

9. The Registrar shall not file the case without the leave of the court or judge if the foregoing order has not been complied with, nor if it shall appear that the press has not been properly corrected, and no costs shall be taxed for any case not prepared in accordance with this order.

10. Together with the case, certified copies of all original documents and exhibits used in evidence in the court of first instance, are to be deposited with the Registrar, unless the production shall be dispensed with by order of a Judge of this court; but the court or a judge may order that all or any of the originals shall be transmitted by the officer having the custody thereof to the Registrar of this court, in which case the appellant shall pay the postage for such transmission.

11. Immediately after the filing of the case, a notice of the hearing of the appeal shall be given by the appellant for the next following session

of the Court as fixed by the Act, or as specially convened for hearing appeals according to the provisions thereof, if sufficient time shall intervene for that purpose, and if between the filing of the case and the first day of the next ensuing session there shall not be sufficient time to enable the appellant to serve the notice as hereinafter prescribed, then such notice of hearing shall be given for the session following, the then next ensuing session.

12. The notice convening the Court under section 14 of the Act for the purpose of hearing election or criminal appeals or appeals in matter of *habeas corpus* or for other purposes shall, pursuant to the directions of the Chief Justice or Senior Puisne Judge, as the case may be, be published by the Registrar in the *Canada Gazette* and shall be inserted therein for such time before the day appointed for such special session as the said Chief Justice or Senior Puisne Judge may direct, and may be in the form given in Schedule A to these rules appended.

13. The notice of hearing may be in the form given in Schedule B to these rules appended.

14. The notice of hearing shall be served at least *one month* before the first day of the session at which the appeal is to be heard.

15. Such notice shall be served on the Attorney or Solicitor who shall have represented the respondent in the Court below, at his usual place of business, or on the booked agent or at the elected domicile of such Attorney or Solicitor at the city of Ottawa, and if such Attorney or Solicitor shall have no booked agent or elected domicile at the city of Ottawa, the notice may be served by affixing the same in some conspicuous place in the office of the Registrar, and mailing a copy thereof prepaid to the address of such Attorney or Solicitor in sufficient time to reach in due course of mail before the time required for service.

16. There shall be kept in the office of the Registrar of this Court a book to be called "The Agents Book," in which all Advocates, Solicitors, Attorneys and Proctors practising in the said Supreme Court may enter the name of an agent (such agent being himself a person entitled to practice in the said court) at the said city of Ottawa, or elect a domicile at the said city.

17. In case any respondent who may have been represented by attorney or solicitor in the Court below, shall desire to appear in person in the appeal, he shall immediately after the allowance by the court appealed from or a judge thereof of the security required by the Act, file

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with the Registrar a suggestion in the form following:—

“A. vs. B.”

“I, A. B., intend to appear in person in this appeal.”

(Signed). A. B.

18. If no such suggestion shall be filed, and until an order shall have been obtained as hereinafter provided for a change of solicitor or attorney, the solicitor or attorney who appeared for any party respondent in the court below shall be deemed to be his solicitor or attorney in the appeal to this court.

19. When a respondent has appeared in person in the court below he may elect to appear by attorney or solicitor in the appeal, in which case the attorney or solicitor shall file a suggestion to that effect in the office of the Registrar, and thereafter the notice of hearing and all other papers are to be served on such attorney or solicitor as hereinbefore provided.

20. A respondent who appears in person may by a suggestion filed in the Registrar's office, elect some domicile or place at the city of Ottawa, at which all notices and papers may be served upon him, in which case service at such place of the notice of hearing and all other notices and papers shall be deemed good service on the respondent.

21. In case the respondent shall have appeared in person in the court appealed from, or shall have filed a suggestion pursuant to rule 17, shall not, before service, have elected a domicile at the city of Ottawa, the notice of hearing may be served by affixing the same in some conspicuous place in the office of the Registrar.

22. Any party to an appeal may on an *ex parte* application to a Judge obtain an order to change his attorney or solicitor, and after service of such order on the opposite party, all services of notices and other papers are to be made on the new attorney or solicitor.

23. At least *one month* before the first day of the session at which the appeal is to be heard, the parties appellant and respondent shall each deposit with the Registrar, for the use of the court and its officers, *twenty-five* copies of his factum or points for argument in appeal.

24. The factum or points for argument in appeal shall contain a concise statement of the facts, and of the points of law intended to be relied on, and of the arguments and authorities to be urged and cited at the hearing, arranged under the appropriate heads.

25. The factum or points for argument in appeal shall be printed in the same form and

manner as hereinbefore provided for with regard to the case in appeal, and shall not be received by the Registrar unless the requirements hereinbefore contained, as regards the case, are all complied with.

26. If the appellant does not deposit his factum or points for argument in appeal within the time limited by order 23, the respondent shall be at liberty to move to dismiss the appeal on the ground of undue delay, as provided for by section 41 of the Act.

27. If the respondent fails to deposit his factum or points for argument in appeal within the said prescribed period, the appellant may set down or inscribe the cause for hearing *ex parte*.

28. Such setting down or inscription *ex parte* may be set aside or discharged upon an application to a judge in chambers sufficiently supported by affidavits.

29. The factum or points for argument in appeal first deposited with the Registrar shall be kept by him under seal, and shall in no case be communicated to the opposite party until the latter shall himself bring in and deposit his own factum or points.

30. So soon as both parties shall have deposited their said factum or points in argument in appeal, each party shall, at the request of the other, deliver to him *three* copies of his said factum or points.

31. Appeals shall be set down or inscribed for hearing in a book to be kept for that purpose by the Registrar at least *one month* before the first day of the session of the court fixed for the hearing of the appeal.

Hearing.

32. No more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply.

33. The court may in its discretion postpone the hearing until any future day during the same session, or at any following session.

34. Appeals shall be held in the order in which they have been set down, and if either party neglect to appear at the proper day to support or resist the appeal the court may hear the other party and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon such terms as to payment of costs or otherwise as the court shall direct.

35. All orders of this court in cases of appeal shall bear date on the day of the judgment or decision being pronounced, and shall be signed by the Registrar.

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Adding Parties to the Appeal.

36. In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency of an original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion as nearly as may be in the form provided for by section 48 of the Act.

37. The suggestion referred to in the next preceding rule may be set aside, on motion, by the Court or Judge thereof.

38. Upon any such motion the Court or a Judge thereof may, in their or his discretion, direct evidence to be taken before a proper officer for that purpose, or may direct that the parties shall proceed in the proper court for that purpose to have any question tried and determined, and in such case all proceedings in appeal may be stayed until after the trial and determination of the said question. •

Motions.

39. All interlocutory applications in appeals shall be made by motion, supported by affidavit to be filed in the office of the Registrar before the notice of motion is served. The notice of motion shall be served at least *four clear days* before the time of moving.

40. Such notice of motion may be served upon the solicitor or attorney of the opposite party by delivering a copy thereof to the booked agent or at the elected domicile of such solicitor or attorney to whom it is addressed at the City of Ottawa. If the solicitor or attorney has no booked agent or has elected no domicile at the City of Ottawa, or, if a party to be served with notice of motion has not elected a domicile at the City of Ottawa, such notice may be served by affixing a copy thereof in some conspicuous place in the office of the Registrar of this Court.

41. Service of a notice of motion shall be accompanied with copies of affidavits filed in support of the motion.

42. Upon application supported by affidavit and after notice to the opposite party, the Court or a Judge thereof may give further reasonable time for filing the printed case, depositing the printed factum or points of either party, and setting down or inscribing the appeal for hearing, as required by the foregoing rules.

43. Motions to be made before the Court are to be set down in a list or paper, and are to be called on each morning of the session before the hearing of appeals is proceeded with.

Appeals to be deemed out of Court for delay.

44. Unless the appeal is brought on for hearing by the appellant within *one year* next after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a Judge thereof shall otherwise order.

45. The foregoing rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Act has otherwise provided.

Criminal Appeals.

46. The foregoing rules shall not, except as hereinbefore provided, apply to criminal appeals, nor to appeals in Habeas Corpus.

47. In the case mentioned in the next preceding rule no printed case shall be required, and no factum or points for argument in appeal need be deposited with the Registrar, but such appeals may be heard on a written case, certified under the seal of the Court appealed from, and which case shall contain all judgments and opinions pronounced in the Court below.

48. In criminal appeals and in appeals in cases of Habeas Corpus, and unless the Court or a Judge shall otherwise order, the case must be filed as follows :—

1. In appeals from any of the Provinces other than British Columbia, at least *one month* before the first day of the session at which it is set down to be heard. .

2. In appeals from British Columbia at least *two months* before the said day.

49. In cases of criminal appeals and appeals in matters of Habeas Corpus, notice of hearing shall be served the respective times hereinafter fixed before the first day of the general or special session at which the same is appointed to be heard ; that is to say :—

1. In appeals from Ontario and Quebec, *two weeks*.

2. In appeals from Nova Scotia, New Brunswick, and Prince Edward's Island, *three weeks*.

3. In appeals from Manitoba, *one month*.

4. In appeals from British Columbia, *six weeks*.

Election Appeals.

50. The foregoing rules are not to apply to appeals in controverted election cases.

51. In such election appeals the party appellant shall deposit with the Registrar such sum as shall be required for printing the record or so much thereof as a judge may direct to be printed at the rate of thirty cents per folio of one hundred words.

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52. The Registrar shall cause *twenty-five* copies of the said record to be printed in the same form as hereinbefore provided for the case in ordinary appeals for the use of the court and its officers, and also *twenty* additional copies, *ten* of which are, upon his request, to be delivered to the appellant free of charge, and *ten* to the respondent upon payment of thirty cents for every folio of one hundred words in the record so printed.

53. The factum or points for argument in appeal in controverted election appeals shall be printed as hereinbefore provided in the case of ordinary appeals.

54. The points for argument in appeal or factum in controverted election cases shall be deposited with the Registrar at least *three days* before the first day of the session fixed for the hearing of the appeal, and are to be interchanged by the parties in manner hereinbefore provided with regard to the factum or points in ordinary appeals.

55. In election appeals a judge in chambers may, upon the application of the appellant, make an order dispensing with the printing of the whole or any part of the record, and may also dispense with the delivery of any factum or points for argument in appeal. Such order may be obtained *ex parte*, and the party obtaining it shall forthwith cause it to be served upon the adverse party.

Fees.

56. The fees mentioned in Schedule C to these orders shall be paid to the Registrar by stamps to be prepared for that purpose.

Costs.

57. Costs in appeal between party and party shall be taxed pursuant to the tariff of fees contained in schedule D. to these orders.

58. The Court or a Judge may direct a fixed sum for costs to be paid in lieu of directing the payment of costs to be taxed.

59. The payment of costs, if so ordered, may be enforced by process of execution in the same manner and by means of the same writ according to the same practice as may be in use from time to time in the Exchequer Court of Canada.

60. Contempts incurred by reason of non-compliance with any order of the Court other than order for payment of money may be punished in the same manner and by means of the same process and writs and according to the same practice as may be in use from time to time in the Exchequer Court of Canada.

Cross Appeals.

61. It shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the Court below should be varied, he shall, within the time specified in the next rule, or such time as may be prescribed by the special order of a judge, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal, or for a special order as to costs.

62. Subject to any special order which may be made, notice by a respondent under the last preceding rule shall be *one month's* notice.

63. A respondent who gives a notice pursuant to the last two preceding rules shall, before or within *two days* after he has served such notice, deposit a printed factum or points for argument in appeal with the Registrar as hereinbefore provided as regards the principal appeal, and the parties upon whom such notice has been served, shall within *two weeks* after service thereof upon them, deposit their printed factum or points with the Registrar, and such factum or points shall be interchanged between the parties as hereinbefore provided as to the principal appeal.

Translations.

64. Any judge may require that the factum or points for argument in appeal of any party shall be translated into the language with which such judge is most familiar; and in that case the judge shall direct the Registrar to cause the same to be translated, and shall fix the number of copies of the translation to be printed, and the time within which the same shall be deposited with the Registrar, and the party depositing such factum shall thereupon cause the same forthwith to be printed at his own expense, and such party shall not be deemed to have deposited his factum until the required number of the printed copies of the translation shall have been deposited with the Registrar.

65. Any judge may also require the Registrar to cause the judgments and opinions of the Judges in the Court below to be translated, and in that case the judge shall fix the number of copies of the translation to be printed and the time within which they shall be deposited with

SUPREME COURT RULES.

the Registrar, and such translation shall thereupon be printed at the expense of the appellant.

Payment of Money into Court.

66. Any party directed by any order of the Court or a Judge to pay money into Court must apply at the office of the Registrar for a direction so to do, which direction must be taken to the Ottawa branch or agency of the Bank of Montreal and the money there paid to the credit of the cause or matter, and after payment the receipt obtained from the bank must be filed at the Registrar's office.

Payment of Money out of Court.

67. If money is to be paid out of Court, an order of the Court or a Judge must be obtained for that purpose, upon notice to the opposite party.

68. Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, countersigned by a Judge.

Formal Objections not to prevail.

69. No proceeding in the said Court shall be defeated by any formal objection.

Extending or abridging time.

70. In any appeal or other proceeding the Court or a Judge may enlarge or abridge the time for doing any act, or taking any proceeding, upon such (if any) terms as the justice of the case may require.

71. The Registrar is to keep in his office all appropriate books for recording the proceedings in all suits and matters in the said Supreme Court.

72. In all cases in which any particular number of days not expressed to be clear days, is prescribed by the foregoing rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless such last day shall happen to fall on a Sunday, or a day appointed by the Governor-General for a public fast or thanksgiving, or any other legal holiday or non-judicial day, as provided by the Statutes of the Dominion of Canada.

73. If it happens at any time that the number of judges necessary to constitute a quorum for the transaction of the business to be brought before the Court is not present, the judge or judges then present may adjourn the sitting of the Court to the next or some other day, and so on from day to day until a quorum shall be present.

*Computation of Time.**Vacations.*

74. There shall be a vacation at Christmas, commencing on the 15th December and ending on the 10th of January.

75. The long vacation shall comprise the months of July and August.

Interpretation.

76. In the preceding rules the term "A Judge" means any Judge of the said Supreme Court, transacting business out of court.

77. In the preceding rules the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such instruction, that is to say :—

- (1) Words importing the singular number include the plural number, and words importing the plural number include the singular number.
- (2) Words importing the masculine gender include females.
- (3) The word "party" or "parties" includes a body politic or corporate, and also Her Majesty the Queen and Her Majesty's Attorney-General.
- (4) The word "Affidavit" includes affirmation.
- (5) The words "The Act" mean "The Supreme and Exchequer Court Act."

Dated this seventh day of February A. D., 1876.

Certified,

ROBT. CASSELS,
Registrar S. C. C.

SCHEDULE A.

Dominion of }
Canada. }

The Supreme Court will hold a special session at the City of Ottawa on the _____ day of _____ 187____ for the purpose of hearing causes and disposing of such other business as may be before the court (or for the purpose of hearing Election appeals, criminal appeals, or appeals in cases of *habeas corpus*, or for the purpose of giving judgments only, as the case may be.)

By order of the Chief Justice
or

By order of Mr. Justice

(Signed)

R. C.
Registrar.

Dated this

day of

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THE BETTING QUESTION.

SCHEDULE B.

Form of Notice of Hearing Appeal.

In the Supreme Court. }

A. B., Appellant, and C. D., Respondent.

Take notice that this appeal will be heard at the next session of this Court to be held at the City of Ottawa, on the day of

187

To

Dated this day of }
187

Appellant's Solicitor or Attorney,

or

Appellant in person.

SCHEDULE C.

Tariff of Fees to be paid to the Registrar of the Supreme Court of Canada.

On entering every appeal..... \$10 00

On entering every judgment, decree or order in the nature of a final judgment \$10 00

On entering every other judgment, decree or order..... \$2 00

In other matters the fees shall be regulated by the Tariff in force in the Exchequer Court of Canada in actions of the first class, and in every case not thereby provided for, the fees to be paid shall be in discretion of the Registrar, subject to revision by the Court or a judge.

SELECTIONS.

THE BETTING QUESTION.

It has often been observed that a period of national laxity generally succeeds to a period of national puritanism. The state of English morals after the Restoration, and the state of French morals after all necessity for hypocrisy had been removed by the death of Louis XIV., are instances of the truth of the remark. And the converse holds good also. It is very probable that we owe a great part of the outcry which, during the course of the last thirty or forty years, has, in certain quarters, been continually raised against every specie of betting, to the inordinate height to which the passion of gambling was carried at the time of the Regency. However that may be, that the outcry exists is clear,

nor does it proceed only from the mouths of would-be moralists, from our pulpits, or from the pages of religious magazines. The legislature has shown a vigilant activity in the matter, and has passed in the present reign a series of progressively restrictive statutes on the subject (8 & 9 Vict. c. 109; 16 & 17 Vict. c. 119; 17 & 18 Vict. 38; 37 & 38 Vict. c. 15); and these statutes, though penal, have been construed strictly against "betting men" by the Courts.* It is our object in the following pages to show, as concisely as possibly, that in spite—perhaps because—of the extreme care bestowed on this question by our Parliament and by our Judges, it stands at present on a by no means satisfactory footing, and for this purpose it will be, in the first place, necessary to give a brief historical sketch of the development of the law concerning wagers and bets.

Originally, then, all such transactions, when not contrary to public policy, were deemed valid at common law.† The first two statutes on the subject were the 16 Car. II. c. 7, and the 9 Ann. c. 14, which, read together as being *in pari materia*, form the foundation of the law as to gaming or wagering as it at present exists, and upon examination of these enactments, and of the cases in which they have come under discussion, it appears plain that they were directed merely against "fraudulent and excessive gaming," their object being to put down betting on "credit or ticket," except for trifling amounts. The Courts of the time, however, appear in interpreting them to have laboured under more than ordinary difficulty. On the 9 Ann. c. 14, in particular, the cases, of which there are many, are most conflicting.‡

* See *Shaw v. Morly*, L. R. 3 Ex. 137; *Bours v. Fenwick*, 43 L.J.N.S. M.C. 107; *Eastwood v. Millar*, Ib. 139; *Haigh v. The Town Council of Sheffield*, L.R. 10, Q.B. 102; and *Oldham v. Ramsden*, 32 L.T. Rep. N.S. 825, which, however, went off on a technical point.

† *Sherbon v. Colebach*, 2 Vent. 175; *Jones v. Randall*, Cowp. 39; *Earl of March v. Pigot*, 5 Burr. 2803; See also *Da Costa v. Jones* (Chevalier d'Eon's case), Cowp. 729; and *Applegarth v. Colley*, 10 M. & W. 723.

‡ *Barjeau v. Walmsley*, 2 Stra. 1214; *Robinson v. Bland*, 1 W. Bl. 234, and see the decisions collected in the judgments of Rolfe, B., *Applegarth v. Colley*, 10 M. & W. 731.

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They were accordingly followed, though at a protracted interval, by the 5 & 6 Wm. IV., c. 41, which, pursuing the principal of the two previous Acts, and still striking at the credit system, provides (s. 1.) that securities given for gaming debts shall be deemed to have been made for an illegal consideration (*Hill v. Ayling*, 20 L.J., Q.B. 171). After the passing of this statute the law may be shortly stated to have stood thus: All contracts for money won at play were void, but where money had been deposited in the hands of a stake-holder to await the event of a game or race, that transaction, not being a credit one, was not regarded as without the pale of the law. "We must assume (it was said in the judgment in *Applegarth v. Colley*, sup. 732, 3), that at all events since the passing of the 5 & 6 Wm. IV., c. 41, the statute of Anne must be taken to avoid all contracts for money won at play. . . But we are of opinion that money deposited in the hands of a stake-holder before a game is played or a race run, to be handed over to the winner, is precisely that sort of transaction that the legislature, supposing that the parties were to engage in play at all, meant to encourage and not to prohibit. It is in no fair sense gaming upon credit or ticket. It is, in fact, the only sort of gaming for ready money which the nature of the case admits. The legislature most wisely thought that they might with comparative safety trust persons to play for money if payment of all losses were made at the time and on the spot, and not deferred to a future occasion."

And here a short digression may be allowed. It will be seen that up to a very recent date the law looked favourably upon those how deposited their stakes and unfavourably upon those who betted on credit. The precise opposite is now the case, and the distinction at present drawn between those who bet on the ready-money system and those who bet on credit—the different measure dealt out to those professional agents, without whose assistance it is perfectly obvious that the general public could never lay a wager at all, and those amateur gamblers who simply bet among themselves—appears to us to form the most curious phase of this question. The reason pro-

pounded for the diversity calls to mind that pretty reason given by Shakespeare's fool, why the seven stars are no more than seven—because they are not eight. Ready-money betting is ready-money betting, and therefore it is immoral and dangerous, and must be put down. Now, whether political and judicial law-makers belong as a rule to the class of men who are said to be so learned as to have lost their common sense, is more than we will venture to affirm, but certainly it seems difficult for plain reason to see how a wager which, when made on the simple faith and credit of the parties entering into it, is perfectly innocent and harmless, can become wrongful and injurious when a deposit is made by one of them of his portion of the stakes. Surely most men would say that the fact of a person's making such a deposit is a proof of his *bona fides*, and a guarantee that he is betting no more than he can afford to put in hazard. But the opponents of the public agent say, with the Irishman, that the reciprocity is all on one side. The backer puts down his money, but the layer does not. This objection, if objection it be, applies to all cases where money is entrusted to an individual, or a commercial firm, or a public company, without a reciprocal security being exacted. How is it, for example, that we pay premiums to an insurance office without insisting upon having, on our side, some pledge that the sum which we expect to receive on the happening of a certain contingency, shall be paid over to us or our representatives? It is because the bare fact of the insurance office existing and plying its business as such, raises a presumption of its solvency and responsibility. The same remark applies to the case of the public betting-agent. There he is carrying on his trade, and the presumption is that he is safe. Besides, before trusting him with our money we may make all enquiries that prudence may dictate, and if it be said that in the case of a company, we have the security of the directors' names, it is answered that experience has amply demonstrated that such security is by no means in every case more reliable than that afforded by the presumption which may be reasonably drawn from the fact of a betting-house being in existence with nothing

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known against it—namely, that it is in a state of solvency.

To resume. The ready-money transactions above alluded to, though favoured by previous enactments, did not escape the 8 & 9 Vict. c. 109, of which the well-known 18th section provides that "All contracts or agreements, whether by parol or in writing, by way of gaming and wagering, shall be null and void, and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." This statute was followed up by those aimed at "betting-houses" and "betting-agents," which we have already enumerated (16 & 17 Vict. c. 119, &c., &c.), and which are too familiar to need any comment. On the whole, we think that the general effect of the group of statutes passed from the year 1845 to the year 1873, may be stated with sufficient accuracy for our purpose, thus:—(1) All instruments made for the purpose of securing gambling debts are null and void as between the parties.* (2) The amount won on a bet is never recoverable, either where the bet was made on credit or where the money was deposited. (3) Parties betting in certain places and under certain circumstances reprobated by the law, are made liable to various penalties prescribed by the statutes made in that behalf.

Now upon this state of the law we should wish to make a few remarks, premising that in what follows we would be understood chiefly to refer to turf-bets, the only species of gambling indeed which has ever been (properly speaking) popular amongst us. It cannot be denied that in spite of these enactments, race meetings are being multiplied continually throughout the country, from which

fact we may fairly draw the inference that public interest in racing and betting (as inseparable, we submit, therefrom) are increasing in the same ratio. Whenever one of the great historical races is about to be brought to an issue, all other topics—political, social and literary—are banished from the thoughts and mouths of the general public. The journals are full of the pedigrees, performances and prospects of the favourites, and with details of the state of the betting-market with respect to their various chances. It is difficult to conceive how people have come to maintain that betting is intrinsically a wrongful act. Common sense must surely take the same view of the matter as we have seen was taken by the common law, that there is nothing to reprobate in a wager when untainted by trickery or fraud. Those who put their ban on betting merely as betting—who dislike it on what they are please to call moral grounds—though their arguments are more candid and more consistent than those used by certain other objectors, to whom we shall presently allude, can only be regarded by the man of the world with feelings of surprise. They are Ascetics (using the word in Bentham's sense), and their conduct can only fitly be compared to that of those fanatical Precisians, who, during the Commonwealth period, shut up theatres and destroyed works of art, simply because they afforded amusement and pleasure to the people. But, it is said, that although this may be so, yet the indirect consequences of betting are most injurious. It leads to idleness and improvidence. Is this so? We must not here allow our judgment to be misled by the contemplation of exceptional cases of men who have ruined themselves on the turf. Such cases exist, just as cases of men who have been crushed by commercial speculation exist, but the clamour that arises when they come under the notice of the public proves their rarity. Prodigals and weak-minded persons are to be met with in every walk of life, and no Act of Parliament can endow them with prudence and wisdom, but the question may be asked, who, amongst reasonable men, ever expected to make a living by backing horses, or who, in the overwhelming majority of

* In *Bubb v. Yelverton*, L. R. 9, Eq. 471, it was apparently doubted by Lord Romilly, M. R., whether a gambling debt secured by bond might not be recoverable. It may also be noticed that in this case Sir R. Palmer (Lord Selborne) *arguendo*, quoted a host of cases to show that "a wagering contract is not illegal, and a security given for it is only voluntary," (*Fitch v. Jones*, 5 E. & B., 238; *Hill v. Fox*, 359, &c., &c.

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cases, bets more than he can well afford to lose, although it must be allowed that the present law puts a premium on dishonesty? Then again, it is both unfair and illogical to say, (as is said whenever the police find a sporting paper and a greasy note-book in the pocket of an offender), that betting tempts men to embezzle or to thieve. Want of money tempts them to do so. Their ill-gotten gains may sometimes be employed in betting; they are doubtless sometimes employed in a worse manner, and it is absurd to think that the number of crimes of this nature is swelled by the practice of betting any more than by the inducements of sloth, of avarice, or of lust.

These so-called objections, then, must fall to the ground. But even supposing there be anything in them and others of a similar nature, which are occasionally urged, we imagine that the force of the few observations we are about to make would not be diminished in the slightest degree. Were we to admit at once that betting is an evil, we should be compelled also to admit that in this country it appears to be a necessary evil. We have already given our reasons for holding this opinion, and if it be correct, and the question be asked how, under the circumstances, should we regard this betting question?—we take the answer to be obvious. We should regard it as we regard the drinking question, and as our French neighbours regard the question of prostitution—not as a subject from which the law should, with mock modest, turn her head, but as one to be by her carefully watched over and regulated. Anybody who has paid the slightest attention to the matter will, we venture to say, grant that all attempts to suppress betting in this country must be futile. But we do not wish to deny that some sort of legal supervision might be advantageously exercised. On the contrary, we are of opinion that it is from the want of it that an evil accrues, with which betting is, in many cases, justly chargeable—though by no means to the extent supposed by some. We mean the prevalence of fraud, cheating or trickery in betting transactions. It was this, and this alone, that was discounted by the common law and struck at by the early statutes. Indeed, even now there is nothing illegal in the making or

paying of a bet pure and simple.* But wagers are now placed altogether without the pale of the law, and no principal in a gaming transaction can sue in the courts of this country in respect of it, whatever the merits of his case may be. It is, we imagine, to this legal prudery—a prudery only incident, it may be noticed, to the old age of the law on this subject—that the prevalence, greater or less, of fraud in these transactions, is chiefly owing. Bring them within the pale of the law, and immediately you strip from them all secrecy, which is the cloak of fraud. The press would have its eye on them—public opinion would be in a position to operate on them. Surely there would be greater hope of reclaiming the lax notions of morality unfortunately entertained by some of those who are in the habit of betting, if the law were to say, “Where a man is bound in honour and conscience, God forbid that a court of law should say the contrary. . . Honour and conscience ought to bind every man in point of law,”* than if it were to continue to hold the language it now holds:—“You have made a bet—which is wrong; you have lost that bet—which is more wrong; but now you refuse to pay that bet—which is most wrong—and you shall have the protection of the law;” for to refuse to give a remedy to a creditor is of course to protect the debtor. It is not the way, we take it, to discourage a thief, to turn your head away and tell him that you will take no notice whatever of his nefarious practices.

We would suggest, then, upon the whole, that seeing that Englishmen will bet, supervision, and not suppression, of gaming transactions should be attempted by our legislature. Betting-houses and betting-agents might be allowed to exist here (under checks and safeguards as strict as may be deemed expedient), rather than driven to establish themselves (without any checks or safeguards at all, as they do now) elsewhere. And

* *Johnson v. Lansley*, 12 C. B., 468, and see the other cases quoted by Sir R. Palmer, *arguendo*, in *Bubb v. Yelverton*, *sup.*; *Rosewarne v. Billing*, 83 L.J., C.P. 55; *Bubb v. Yelverton*, (Lord Charles Kerr's claim), 24 Law Rep. 822.

* *Per Bathurst, J.*, *Turner v. Vaughan*, 2 Wils. 539.

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[C. L. Cham.]

so with bets made by individuals *inter se*. Permit them to be recovered by process of law, and then, were a fraudulent, unfair, or improper transaction to come before the courts, we can see no good reason why they should not be able to deal with it, in this, as in any other case. Perhaps, after all, the chief reason why the courts have regarded gambling cases, as they are called, with antipathy, is because they think that if in any way encouraged an undue proportion of such cases would be brought before them. Even if this were likely to occur, it is imagined that part of the duty of our judges is to superintend the social life of the people, but as a matter of fact, there is really no danger of such a state of things arising, and for very obvious reasons. No better would resist payment unless he had a good defence to the claim, for to do so would be to ruin his credit and social position at once and for ever. And it is clear, on the other hand, that in the vast majority of betting transactions no points of intricacy or delicacy can arise.

It was thought by some that this question would have formed a subject of discussion in the last Session of Parliament, and although that has not happened, the time must soon come for it to be carefully and comprehensively reviewed by the Houses. We hope that then the unequal pressure of a great portion of the enactments now obtaining will be noticed, and that some return to the ancient common-sense doctrine of the law on wagers and bets may be attempted, of which we should have the less fear if we could feel certain that our law-makers, bearing in mind the fact that all Englishmen are conservative where their pastimes are concerned, and the length of time during which racing and betting have gone hand in hand as twin national institutions, would also reflect seriously on the proposition laid down by a great modern thinker,* that "A philosophy of laws and institutions not founded on a philosophy of national character is an absurdity."

—*Law Magazine.*

* John Stuart Mill.

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ONTARIO.

COMMON LAW CHAMBERS.

FAGAN V. WILSON.

Transmission of depositions—Certified copies.

Held that sec. 193 of C. L. P. Act permits the transmission of certified copies of depositions; an application to transmit the originals was therefore refused.

[Jan. 12, 1876.—MR. DALTON.]

W. R. Mulock applied for an order to transmit original depositions to the clerk of assize, to be used as evidence in a case then pending.

The ground on which the application was made was that certified copies of depositions were not admissible as evidence under C. L. P. Act s. 193, which enacts that "examination, and depositions certified under the hand of the judge, or other officer or person taking the same, shall without proof of the signature be received and read in evidence." Reference was made to an unreported case in which it was said that *STRONG, J.*, had held that this section did not permit the use of certified copies as evidence. The same view is taken in the note in *HARR. C. L. P. Act p. 270.*

MR. DALTON—The object of the section seems to have been simply to provide that depositions should be admissible as evidence at a trial, without reference to the question whether they were originals or not. It is greatly to be desired that there should be an authoritative decision on the point. In my opinion it would be quite sufficient to produce the certified copies at the trial. In *Flett v. Perrins*, L. R. 3 Q. B. 536, an examined copy of answers to interrogatories was received in evidence in a different suit from that in which they were originally taken. I must refuse the order.*

Order refused.

[* *Mr. Harrison* in his note says: "The meaning cannot be that office copies given out should be certified by the judge, or other officer or person, taking the same; for the officer takes the original examination or depositions, and not office copies." The wording of the section seems conclusive that the learned annotator and *Mr. Justice Strong*, were correct in their view. It might be desirable to permit certified copies to be used, but the section as it stands does not seem to contemplate it. Eds. L. J.]

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FOR AUGUST, SEPTEMBER, AND OCTOBER, 1875.

*From the American Law Review.*ACCUMULATION.—*See* ANNUITY, 1.

ACT OF GOD.

The defendant owned land upon which had been built embankments for the purpose of damming up a natural stream which ran through the land, and thereby forming large pools. An extraordinary storm, accompanied by rain, heavier than ever known by witnesses to have taken place there previously, occurred; and, in consequence, the stream was so swelled that it carried away the plaintiff's bridges. The jury found that there was no negligence in the construction or maintenance of the embankments, and that the storm was of such violence as to constitute the cause of the accident *vis major*. *Held*, that the defendant was not liable.—*Nichols v. Marstrand*, L. R. 10 Ex. 255.

ADEMPTION.

A testator bequeathed "all my shares or stock in the Midland Railway Company" to trustees upon certain trusts, and bequeathed his railway estate to others. At the date of his will the testator possessed £1,000 stock in said company, but afterwards transferred it to certain bankers by way of security for a loan made by them to one S., who gave the testator an undertaking to re-transfer the stock within three months. At the testator's death the stock had not been re-transferred; and subsequently the bankers sold it, and applied it to the payment of S.'s debt. S. paid £500 stock into court, but was unable to pay more. *Held*, that the trustees, and not the residuary legatee, were entitled to said £500 stock.—*Bothamley v. Sherson*, L. R. Eq. 304.

ADVANCEMENT.—*See* HUSBAND AND WIFE, 1.AGREEMENT.—*See* CONTRACT; FRAUDS, STATUTE OF.

ANNUITY.

1. A testator gave all his real and personal estate to trustees upon trust, so to vest his real estate in the Court of Chancery, and place his personal estate under its control, that both should be administered by said court. The testator then directed that certain annuities should be paid from the rents and profits of his real and personal estate, and that, subject to such annuities, the income of the trust estate should be accumulated at compound interest until the decease of the last survivor of said annuitants, or during such portion of such surviving annuitant's life as the rules of law should permit; and that on the decease of such survivor, all the trust estate and its accumulations should be applied by said court in the

purchase of land to be conveyed to G. and his heirs. *Held*, that, for the period which might elapse after the expiration of twenty-one years from the death of the testator to the death of the surviving annuitant, there was intestacy. G. was not entitled, during the life of the surviving annuitant, to the trust funds subject to the annuities.—*Talbot v. Jevors*, L. R. 20 Eq. 255.

2. A testator devised his estate to trustees upon trust to pay the income for the benefit of his wife and his daughter and son, and directed that, upon his youngest child attaining twenty-one, the trustees should invest a sufficient sum to secure the receipt of the annual sum of £50, which should be paid in instalments, as the dividends were received, to his wife; and, subject thereto, the trustees were to divide the whole of the trust estate in equal shares among the testator's children; and, upon the death of the wife, the amount invested to secure her annuity was to be divided in like manner among the children. The income of the whole fund did not amount to £50 a year. *Held*, that the widow was not entitled to have the deficit in the income made good from the principal.—*Mitchell v. Willton*, L. R. 20 Eq. 269.

APPROPRIATION OF PAYMENT.

On Dec. 11, the plaintiffs paid over to W., their banker at Southwell, £900 in notes, and eight bills of exchange, amounting to £1,622; total, £2,422. This sum was paid under specific instructions to W. that it was for the express purpose of meeting certain acceptances for £2,280, payable at R.'s, a banker in London, on Dec. 12. On Dec. 11, W. forwarded said bills and £500 in notes and two other small checks, total £2,121, with a letter in printed form debiting R. with this sum, and crediting him with £849, which he was directed to pay. Under the head of "Advice of drafts" were described the plaintiff's acceptance for said £2,320. R. received W.'s letter on Dec. 12, and on Dec. 14 W. stopped payment. R. then refused to pay the amounts due on the plaintiff's acceptances, but retained said bills and notes sent to him by R. *Held*, that as between the plaintiffs and R. there was no appropriation of the bills and notes to the acceptances, and that R. was entitled to retain said bills and notes without meeting the acceptances.—*Johnson v. Roberts*, L. R. 10 Ch. 508.

BANK.—*See* HUSBAND AND WIFE, 1.BANKRUPTCY.—*See* SALE; VENDOR AND PURCHASER, 2.BEQUEST.—*See* REDEMPTION; ANNUITY; DEVISE; LEGACY; VENDOR AND PURCHASER, 1.

BILL OF LADING.

The defendants bought from M. all the ore in a mine in Spain, to be shipped by M. on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or on the execution of a charter, and on a certificate that there wa

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enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Payments were made exceeding in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded. M. loaded the T., one of the chartered vessels, with ore; but he took bills of lading making the shipment to be by one S., and the cargo deliverable to S.'s order. The bills of lading were properly signed by the captain of the vessel, as, by the charter, he was to sign the bills as presented. S. was a fictitious person, and M. indorsed S.'s name and then his own on the bill of lading, and then pledged it to the plaintiffs. *Held*, that the plaintiffs were entitled to the cargo.

In a second case the above defendants brought an action upon a charter-party against the shipowner for not delivering a cargo of said ore which was on board a vessel chartered for carrying the ore as stated in the first case. This charter-party did not authorize the captain to sign bills of lading as presented, but under it the cargo was to be delivered to the plaintiffs in this action. The above-mentioned M. handed bills of lading in the form mentioned in the first case, and the captain signed them. M. then indorsed them to G., to whom the captain delivered the cargo. *Held* by (Bramwell and Cleasby, B.B., Kelly, C.B., dissenting), that the shipowner was not liable for not delivering the cargo to the plaintiffs. —*Gabarron v. Kreeft*; *Kreeft v. Thompson*, L. R. 10 Ex. 274.

See CHARTER-PARTY, 1.

BILLS AND NOTES.—See APPROPRIATION OF PAYMENTS; LIEN.

CHARTER-PARTY.

1. The owners of a ship chartered her to the plaintiffs, and that charter-party contained a stipulation that the master should sign bills of lading for weight of coal put on board, as presented to him by charterers, without prejudice to the charter-party. By mistake, the master signed bills of lading for 30 tons of coal more than were actually taken on board. The owners paid the value of the 30 tons to the consignees. *Held*, that the owners were not estopped by the charter-party from showing that the total amount of the coal specified in the bills of lading was not actually put on board, and that they were, therefore, not bound to pay the value of said 30 tons to the consignees, and were, therefore, not entitled to recover it from the charterers. —*Brown v. Powell Coal Co.*, L. R. 10 C. P. 562.

2. The defendants chartered the plaintiff's vessel, "freight to be paid in cash, loading and discharging the ship as fast as she can work, but a minimum of seven days to be allowed merchants, and ten days above said lying-days, at £25 per day." *Held*, that "lying-days" meant working-days, and did not include a Sunday. The vessel got into dock at 8 A.M., on Wednesday, and discharged all day; and began again on Thursday, at 4 A.M., and finished at 8 A.M. All the lying-days were consumed at the port of loading.

Held, that the fraction of a day counted as a whole day, and that the charterers must pay two days' demurrage. —*Commercial Steamship Co. v. Boulton*, L. R. 10 Q. B. 346.

See BILL OF LADING.

CHECK.

A. being indebted to the plaintiff, gave him a check payable to his order. The plaintiff indorsed the check, and crossed it with the name of the L. Banking Company; after which it was stolen, and passed into the hands of B., a *bona fide* holder for value. B. deposited the check in his own bank, which presented it to the defendant's bank, where it was paid. By statute, the holder of an uncrossed check may cross it with the name of a banker; and in such case the banker upon whom the check is drawn shall not pay it to any other than the banker whose name is so crossed. *Held*, that plaintiff was not entitled to recover. The statute did not give the plaintiff any right of action against the defendant. —*Smith v. Union Bank*, L. R. 10 Q. B. 291.

COMPANY.

1. Shares of a company were, in pursuance of an *ultra vires* resolution of the board of directors, transferred to A., a director in trust for the company. B., a director, came to the meeting after the proceedings were begun, and he denied all knowledge thereof. C. was not present at the meeting, but was present at a subsequent meeting at which the minutes of the previous proceedings were formally approved. *Held*, that A. was entitled to contribution from the directors, who concurred in the resolution, for calls that he had paid, and that B. must contribute, but not C. —*Ashurst v. Mason* L. R. 20 Eq. 225.

2. The directors of a company were authorized to borrow money; to issue debentures for the purpose of securing the repayment of, or raising of, money borrowed; and to exercise and do all such powers, acts, deeds, and things which the company might exercise and do. *Held*, that the directors had power to issue debentures at a discount. —*In re Anglo-Danubian Steam Navigation & Colliery Co.*, L. R. 20 Eq. 339.

CONDITION.

Devise to J. on condition that he never sells the land out of the family. *Held*, that the condition was valid. —*In re Macleay*, L. R. 20 Eq. 186.

CONSTRUCTION.—See ADEMPMENT; ANNUITY; APPROPRIATION OF PAYMENTS; CHARTER-PARTY, 1; CONTRACT; DEVISE; GRANT; LEASE; LEGACY; LIMITATIONS, STATUTE OF; PARTNERSHIP; VENDOR AND PURCHASER, 1.

CONTRACT.

The defendant sold the plaintiff 3,400 tons of iron, delivery to begin by January 15, and to be completed May 15, 1873. In the event

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of the plaintiff's ships not being ready within fourteen days, notice being given, then the payments to be made against wharf warrants for each 500 tons slacked and being to buyer's order, the defendant undertaking to put free on board when the vessel was ready. If the defendant exceeded the time for delivery, he was to pay 7s. 6d. per week by way of fine. Delivery was made during May, June, July, and August, and was completed in September, 1873. *Held*, that the fine must be calculated from May 15, 1873.—*Bergheim v. Blaznavor Iron Co.*, L. R. 10 Q. B. 819.

See BILL OF LADING; CHARTER-PARTY, 1; DAMAGES, 2; LIMITATIONS, STATUTE OF; PARTNERSHIP; RAILWAY, 2.

CONTRIBUTION.—See COMPANY, 1.

CONVICTION.

The appellant was convicted for negligently injuring the respondent in driving his carriage against the latter. He was again convicted on the same facts and under another statute for an assault on the respondent. *Held*, that the first conviction was a bar to the second.—*Wemyss v. Hopkins*, L. R. 10 Q. B. 378.

COPYHOLD.—See DEVISE, 1.

COVENANT.—See LEASE.

CRIMINAL LAW.—See CONVICTION; INFANCY.

CUSTOM.—See LIEN.

DAMAGES.

1. The plaintiff owned certain building-land, and also land upon which he had built a reservoir. A railway company took the building-land. By statute, in estimating the compensation for the land taken, the arbitrators were to take into consideration the damage occasioned by severance from other lands of the owner, or otherwise injuriously affecting such other lands. The arbitrator, being of opinion that the land taken would have been inevitably covered with mills which would have been supplied with water from said reservoir, allowed compensation for the plaintiff's loss of the sale of the water from his reservoir to the mills which would thereafter be built. *Held*, that such compensation was properly awarded.—*Ripley v. Great Northern Railway Co.*, L. R. 10 Ch. 148.

2. K. was the owner of land on each side of a highway, the soil of which also belonged to him, subject to the right to use and maintain the road. The natural surface of the ground formed a valley which the road crossed on an artificial embankment. K., who wished to tunnel the embankment, employed the plaintiff to do the work. The defendants, a waterworks company, had laid their pipes along said road in accordance with powers conferred by statute. The plaintiff proceeded with his work, and, after tunnelling the embankment, found that one of the defendants' pipes was leaking, and notified the defendants thereof. After some time, the leak was stopped; but the plaintiff was de-

layed by the leak, and put to expense. *Held*, that the plaintiff could not maintain an action for damages done to K.'s property, although he had in consequence lost money under his contract with K. *Held*, also, that even if K. would have been indictable for a nuisance to the way, nevertheless his partial obstruction of the way would not render his whole proceedings so illegal as to prevent him from recovering damages for a wrong.—*Cattle v. Stockton Water Works*, L. R. 10 Q. B. 453.

See LEASE, 1; LIBEL; VENDOR AND PURCHASER, 3.

DEED.—See ESCROW; GRANT.

DELIVERY.—See ESCROW.

DEMURRAGE.—See CHARTER-PARTY, 2.

DEPOSIT.—See VENDOR AND PURCHASER 2.

DEVISE.

1. Devise of freeholds and copyholds to A. and B. upon trust during the life of C. to receive and pay the rents to C., or otherwise to permit him to receive them; and, after the decease of J., the estates were devised to the heirs of the body of C. The testator nominated A., B. and C. executors of his will. *Held*, that C. took an estate-tail in the freeholds, and the equitable life-estate in the copyholds.—*Baker v. White*, L. R. 20 Eq. 166.

2. A testatrix gave her real and personal estate to her husband for life, and after his death "to be divided amongst my five children, share and share alike; and if any of my children should die without issue, then that child or children's share shall be divided, share and share alike, among the children then living; but if any of my children should die leaving issue, then that child (if only one) should take its parent's share; if more than one, to be divided equally amongst them, share and share alike." One of the five children, all of whom survived the tenant for life, died leaving children. *Held*, that her share went to her children. Another child died childless. *Held*, that her share went to the three surviving children of the testatrix.—*Olivant v. Wright*, L. R. 20 Eq. 220.

3. A testatrix gave all her estate, both real and personal, to M., for her sole use during her lifetime, and after her death to her children, in equal parts: in case M. died leaving no issue, the whole of the property to go to the next of kin. M. had one child, who died before M. On the death of M., her husband claimed said real estate. *Held*, that, as a vested interest was given to the child of M., the words "leaving no children" must be read, "having had no children;" and that therefore the plaintiff was entitled to said real estate.—*Treharne v. Layton* L. R. 10 Q. B. (Ex. Ch.) 459.

See ADEMPMENT; ANNUITY; CONDITION; LEGACY; VENDOR AND PURCHASER

DIRECTORS.—See COMPANY.

DISSENTAILMENT.—See ESTATE TAIL.

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DISTRESS.—*See* RENT.EASEMENT.—*See* GRANT, 2.EJECTMENT.—*See* LEASE.EMINENT DOMAIN.—*See* DAMAGES, 1.ENTRY.—*See* LEASE.EQUITY.—*See* INJUNCTION; SPECIFIC PERFORMANCE; VOLUNTARY SETTLEMENT.

ESCROW.

Delivery of a deed to the solicitor of a grantee does not necessarily convert the instrument from an escrow to a deed.—*Watkins v. Nash*, L. R. 20 Eq. 262.

ESTATE-TAIL.

Four children were entitled to joint-estates for life, remainder to them and a fifth child in tail, with cross-remainders in tail between them. A., one of the four children, executed a disentailing deed of his estates-tail. The fifth child subsequently died without issue. *Held*, that A's fifth share, together with his fourth share in the share of the child who died, were effectually disentailed.—*Tufnell v. Borrell*, L. R. 20 Eq. 194.

ESTOPEL.—*See* CHARTER-PARTY, 1.EXECUTORS AND ADMINISTRATORS.—*See* SET-OFF.FRAUD.—*See* BILL OF LADING.

FRAUDS, STATUTE OF.

The plaintiff entered into an agreement with the defendant, dated Oct. 4, 1871, to let the defendant a public-house at £160 per annum; the defendant to have the right to require a twenty-eight-years' lease at a rent of £100, upon payment of £1,200; and in case the tenant should, after the granting of the lease, sell the business for a larger sum than £1,200, the excess was to be divided between the plaintiff and defendant. It was subsequently verbally agreed that £800 only should be paid on the granting of the lease; that the term should be thirty-two years, and the rent £105; and that several covenants, burdensome to the defendant, should be omitted. A lease with these variations from the agreement was signed April 4, 1873. The defendant sold the lease for £2,500, and refused to share the surplus over £1,200. The jury found that there was no abandonment of the written agreement, except so far as it was varied by the written lease. *Held*, that the lease put an end to the written agreement; and that if it was the intention of the parties to retain the agreement concerning the division of the bonus, it was not in writing so as to satisfy the statute of frauds. *Quære*, whether, if there had been anything in writing showing that the lease was a mere substitution for the agreement, the action might not have been maintained.—*Sanderson v. Graves*, L. R. 10 Ex. 35.

GOOD WILL.—*See* LEASE, 1.

GRANT.

1. R., a tenant for life of a house, leased it to A. for ten years, expiring Nov. 13, 1864; and again to B. for a term expiring Nov. 13, 1874. On Nov. 10, 1864, R., by deed, "granted, demised, and leased to B., his executors, administrators, and assigns," the house, "to have and to hold the house hereby demised unto B., his executors, administrators, and assigns, from Nov. 13, 1874, for the term of the aforesaid R., for the term of his natural life. *Held*, that there was a grant *in presenti* of the life-estate, notwithstanding the words of the *habendum*.—*Bodington v. Robinson*, L. R. 10 Ex. 270.

2. The defendant owned a cottage and stable called "Roseville," abutting upon a public way, and also of a farm called "Rose Cottage Farm," abutting upon the same highway, and having a private way which passed by the Roseville stable. H. leased Roseville of the defendant for ten years, and built a hay-chamber over the stable, with openings on a side of the stable which abutted on said private way. The defendant gave H. permission to use the private way (which was not demised to H.) for his hay-carts, and H. so used it for ten years. At the expiration of said lease, the defendant conveyed Roseville to the plaintiff, "together with all ways, and rights of way, liberties, privileges, easements, advantages, and appurtenances to the messuage, &c., appertaining, or with the same now or heretofore demised, occupied, or enjoyed or reputed as part or parcel of them, or any of them, or appurtenant thereto." *Held*, that the right to use the private way as aforesaid passed to the plaintiff.—*Kay v. Ozley*, L. R. 10 Q. B. 860.

HABENDUM.—*See* GRANT, 1.

HUSBAND AND WIFE.

1. M., who was in failing health, transferred his bank account to the joint names of himself and his wife, and requested the bank to honour any checks drawn either by himself or his wife; and he remarked at the time that the balance of the account would belong to the survivor of himself and his wife. The wife drew all the checks, which were duly paid, and the proceeds applied in payment of household and other expenses. M. died, leaving a considerable sum standing to the credit of the account. *Held*, that the transfer was not intended to be a provision for the wife, but simply a mode of conveniently managing M.'s affairs; and that the widow was therefore not entitled to the fund. *Marshall v. Crutwell*, L. R. 20 Eq. 328.

2. Money and furniture were settled upon a married woman to her separate use. As the furniture from time to time wore out, she replaced it with new furniture bought with the income of her separate property. The new furniture was seized by the sheriff upon an execution against the husband. *Held*, that in equity the new furniture belonged to the wife.—*Duncan v. Cushin*, L. R. 10 C. P. 554.

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INFANCY.

The prisoner was convicted of having "unlawfully taken an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father." The girl was in fact only fourteen, but looked much over sixteen; and she told the prisoner that she was eighteen, and the prisoner believed her. *Held*, (by KELLY, C.B., CLEASBY, POLLOCK, and AMPHLETT, BB., and GROVE, QUAIN, and DENMAN, JJ.,—BETT, J., dissenting), that the conviction should be affirmed.—*The Queen v. Prince*, L. R. 2 C.C. 154.

INJUNCTION.

The lessee of a theatre sublet certain boxes in the theatre to the plaintiff, together with egress and regress to and from the boxes during all such nights as the theatre should be open for the exhibition of any opera or entertainment off or upon the stage, except balls and masquerades; reserving to the lessor the right to enter to repair and clean. Subsequently, and at a time when no theatrical performances were going on, the lessor leased the theatre to Moody and Sankey for religious meetings and for this purpose boarded over the plaintiff's boxes. The plaintiff prayed an injunction. *Held*, that inasmuch as the boarding was only temporary, and would be removed before the operatic season began, and did not injure the boxes, an injunction would not be granted.—*Leader v. Moody*, L. R. 20 Eq. 145.

LANDLORD AND TENANT.—*See LEASE; RENT.*

LEASE.

1. The plaintiff held a public-house under a lease from the defendant, containing a proviso, that, at the expiration of the term, all such sums of money as could be procured for the good will of the business of a licensed victualler in respect of said premises should belong to the plaintiff. At the expiration of the lease, the defendant claimed an increased rent, and a sum by way of premium. The plaintiff refused these terms; and the premises were leased to one B. at an increased rent, and a premium of £1,300, for a fourteen-years' lease. Nothing under the name of good will was paid by B. It was found by an arbitrator that the rent reserved was a sufficient rental for the premises without any bonus, apart from the special value which the premises possessed owing to the old and successful business which had been carried on there by the plaintiff; and also that the good will of the plaintiff would, if belonging to the defendant, have been worth over £1,300. *Held*, that the proviso had been broken; and that, in determining the value of the good will, the arbitrator was not to be guided absolutely by the fact that £1,300 had been paid by B. as premium, and that he was to consider the increased value of the good will by reason of the general improvement of the locality.—*Llewellyn v. Rutherford*, L. R. 10 C. P. 456.

2. An agreement for an under-lease was made between a lessee and the defendant, con-

taining, among others, the following terms: The lease to contain an extract of the covenants in the original lease, and the proposed lease not to be sold, or any portion of the property underlet, without the consent in writing of said under-lessor. The original lease contained a proviso for re-entry in case of breach of covenant; but there was no covenant against underletting. The defendant underlet, and his lessor entered, and brought ejectment. *Held*, that the plaintiff was properly nonsuited, as he had no right of entry under said agreement for breach of covenant not to underlet.—*Crawley v. Price*, L. R. 10 Q. B. 302.

See FRAUDS, STATUTE OF; INJUNCTION RENT.

LEGACY.

Bquest of residue in trust to pay the interest half-yearly "to pay my sons C. and J. equally for their natural lives, and at their death the principal to be divided equally between the children of the said C. and J." *Held*, that "at their death" meant "at the death of each respectively;" and that, therefore, the children of C. were entitled at his death to one-half the principal.—*Wills v. Wills*, L. R. 20 Eq. 342.

See ADEMPION; ANNUITY; DEVISE.

LIBEL.

Declaration that the defendants falsely and maliciously printed and published the plaintiffs' names under the heading "First meeting under the new Bankruptcy Act," meaning thereby that the plaintiffs had become bankrupt. In fact, the plaintiffs' names were inserted by mistake under the above heading, instead of under the heading "Dissolution of Partnerships." The jury found that the publication was libellous, and gave damages £50. The defendants moved for arrest of judgment on the ground that the declaration disclosed no cause of action, and for a new trial because of excessive damages. The court refused the motions.—*Shepherd v. Whitaker*, L. R. 10 C. P. 502.

LIEN.

A. contracted with B. to buy a certain quantity of rails, the contract containing the following stipulation: "Payment to be made by buyer's acceptance of seller's drafts at six months' date against inspector's certificate of approval, and wharfinger's certificate of each 500 tons being stacked and ready for shipment." The wharfinger's and inspector's certificate were, as they were signed, delivered to A. in exchange for his acceptances of bills at six months, which bills B. negotiated. The plaintiff advanced A. money against three of said wharfinger's certificates. A. became insolvent, and his acceptances were dishonoured. The rails were still in B.'s hands. The plaintiff filed a bill, in which he claimed a lien for his advances on the rails mentioned in his certificates; and he alleged, that, according to the custom of the iron trade, said wharfinger's certificates were in fact warrants; and he prayed an injunction restraining B from

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parting with said rails without first satisfying his lien. *Held*, that the acceptances were only payment conditional upon their being honoured; and that, upon their being dishonoured, B.'s lien upon the iron revived, and that the negotiation of the bills made no difference. Also that the wharfinger's certificates were not warrants or documents of title; and that the fact that money was lent upon their being pledged to the lender could not affect the vendor's lien.—*Gunn v. Bolckow, Vaughan, & Co.*, L. R. 10 Ch. 491.

LIMITATIONS, STATUTE OF.

The plaintiff, a married woman, advanced £20 to the defendant during the lifetime of her husband. In 1867, after the husband's death, the defendant gave the plaintiff an I. O. U. for the amount. The I. O. U. was not paid; and the defendant, being pressed by the plaintiff, wrote in 1871. "It is totally out of my power to liquidate the whole, or even part, of the claim. I am in the anticipation of a better position; and, should I be successful, the claim shall have my first consideration. Meanwhile I shall be pleased to pay a reasonable interest on the amount. The claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible." And again, in 1871, the defendant wrote, "I can assure you, at present it is utterly out of my power to do anything. I am willing to endeavour to pay it [the debt] off by easy instalments; or I am willing to pay you any reasonable interest to let the matter remain for the present." The plaintiff brought an action in 1874 for money lent, with a count upon a promise to pay in consideration of the plaintiff's forbearance to sue. *Held*, that said letters constituted a fresh promise, for which the forbearance to sue until 1874 formed sufficient consideration.—*Wilby v. Elgee*, L. R. 10 C. P. 497.

LORD'S DAY.

1. The defendants, an incorporated company, were the owners of a building used as an aquarium. There was a room used as a museum, wherein were illuminated microscopes; and there was a reading-room and a dining-room, conservatories and a café. The building was open to the public on payment of an entrance fee of 6d. On Sunday evening, sacred music was played; and the fish were fed at stated hours. Catalogues, guide-books, and programmes of the museum, animals, &c., were sold in the building. Food, wine, and spirits were sold to the visitors. *Held*, that the aquarium was a "place used for public entertainment or amusement."—*Terry v. Brighton Aquarium Co.*, L. R. 10 Q. B. 306.

2. In a second action, the facts were the same as in *Terry v. Brighton Aquarium Co.*, except that it was stated that the reading-room was used on week days only; and the statements, as to a band playing sacred music on Sunday evenings, and as to newspapers and illuminated microscopes being provided in the building for the amusement of visitors, were omitted.—*Held*, that the aquarium was a "place used for public entertainment or

amusement."—*Warner v. Brighton Aquarium Co.*, L. R. 10 Ex. 291.

MAINTENANCE.—See TRUST.

MARRIED WOMAN.—See HUSBAND AND WIFE; TRUST.

MARTER AND SERVANT.—See PRINCIPAL AND AGENT; TRESPASS.

MORTGAGE.

W., a solicitor, and the acting trustee of a settlement, lent C., a client of his. £2,000 upon a mortgage of a certain estate, the deeds of which were duly delivered to W. Subsequently W. fraudulently delivered the title-deeds to C., who deposited them with his bank as security for advances. The bank informed C. that a solicitor's certificate of title was necessary: whereupon C. referred the bank to W. The bank sent the deeds to W., who certified that C. had a good title, and received a fee from the bank. W. became bankrupt, and the above facts were discovered. C., and afterwards W., died. The surviving trustee and the beneficiaries brought a bill against the bank, praying a declaration that the plaintiffs were first mortgagees, and for delivery of the title deed. *Held*, that the bank had no constructive notice of the first mortgage, and was a mortgagee for value without notice of the first mortgage.—*Waldy v. Gray*, L. R. 20 Eq. 238.

NEGLIGENCE.

1. The defendant railway was obliged by statute to carry all carriages, &c., upon its lines, upon payment of certain tolls; and, in fact, received between twenty thousand and thirty thousand foreign trucks weekly. One G. hired trucks from a waggon company, which was to keep the trucks in repair. One of these trucks arrived at Peterborough on the defendant's line, and was there examined by a person in the defendant's employ, and found to have a spring broken, and a part of the wood-work cracked. The waggon company put in a new spring without unloading the truck, but did not repair the crack in the wood. The truck was then carried forward and broke down, owing to an old crack in the axle which had not been discovered, and the plaintiff was injured. The jury found that the defect in the axle would have been discoverable upon fit and careful examination; that it was not the duty of the defendant to examine the axle by scraping off the dirt, and so minutely examining it that the crack would have been seen; and that it was the defendant's duty to require from the waggon company some distinct assurance that the truck had been thoroughly examined and repaired. Verdict for defendant, with leave to the plaintiff to move for a verdict for the plaintiff for an agreed sum. *Held*, that, the plaintiff was entitled to a verdict.—*Richardson v. Great Eastern Railway Co.*, L. R. 10 C. P. 486.

2. The plaintiff, who had sent a heifer by the defendants' railway to the P. station, assisted with the assent of the station-master, in shunting the car in which was the heifer,

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on to a siding, and while so doing was injured by the defendants' negligence. *Held*, that, as the plaintiff was on the siding with the consent of the station-master, that is, of the defendants, the defendants were liable.—*Wright v. London and North-Western Railway Co.*, L. R. 10 Q. B. 801.

See ACT OF GOD ; DAMAGES, 2 ; RAILWAY.
2 ; TRESPASS.

NOTICE.—See MORTGAGE.

NUISANCE.—See DAMAGES, 2.

PARTNERSHIP.

The plaintiff and defendant agreed that an underwriting account should be carried on under the following conditions : That it should be carried on in the name of the defendant only ; that policies, losses, and averages should be settled by the defendant, or by the plaintiff as his agent ; that the plaintiff should apply the whole or such part of his time to the business as should be required for conducting the same ; that proper accounts of the business should be kept by the plaintiff, he obtaining such assistance from time to time as he should find necessary ; that the plaintiff should be paid a salary of £150 yearly, by half-yearly payments ; that the profits, after deducting all expenses, should be divided between the defendant and plaintiff, the former receiving four-fifths, and the latter one fifth ; but, if in any year the business should be carried on at a loss, such loss should be borne by the defendant only ; and that if, after any year's division of profits, any unexpected claim should be made against the said parties, they should advance and pay their respective proportions thereof ; nevertheless, so that the plaintiff should not be called upon to pay any greater sum in respect of the business of any year than the sum he should have received as his share of the profits for such year. *Held*, that under the agreement the plaintiff was not a partner.—*Ross v. Parkyns*, L. R. 20 Eq. 331.

PAYMENT.—See LIEN.

PERPETUITY.—See ANNUITY, 1.

PRINCIPAL AND AGENT.

The defendant was chairman of a meeting at which there was a disturbance, during which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff, who was making no disturbance, was seized by a man with a white ribbon in his coat, and two policemen, and dragged over some benches to the front part of the gallery, and injured. *Held*, that there was no relation of master and servant, or principal and agent, between the defendant and the officers, and that the words spoken by the defendant did not authorise the officers to assault the plaintiff ; and that the defendant was therefore not liable.—*Lucas v. Mason*, L. R. 10 Ex. 251.

See MORTGAGE ; PARTNERSHIP ; TRESPASS.
RAILWAY.

1. A railway rated as land within a statute laying a tax.—*The Queen v. Midland Railway Co.*, L. R. 10 Q. B. 389.

2. The plaintiff was in charge of certain sheep to be sent from A. to C. A ticket was issued to the plaintiff by the North British line containing the following terms : "If it is desired that any person accompanying the live stock shall be allowed to travel in the same train as the stock without paying a fare, he must travel at his own risk, and must either sign this in token that he agrees to travel at his own risk, or must pay fare : 'I agree to travel at my own risk without paying any fare, and accept a free pass, subject to the following conditions,—that the holder exonerates the company from all responsibility for injury to himself, however occasioned, on the journey for which it is issued.'" The plaintiff did not sign the ticket, and was not asked to do so. The North British line goes no farther than B. ; but from B. the cattle-trucks, in which was the plaintiff, were attached to a train of the defendants, and sent along their line to C., under traffic arrangements with the North British line. After leaving B., the plaintiff was injured by the defendants' negligence. *Held*, that the plaintiff was in the same position as if he had signed said ticket, and that the terms of said ticket extended to all risks, connected with the journey from A. to C., which the plaintiff might meet with as a passenger ; and that the North British Railway was authorised to contract with the defendants to carry the plaintiff from B. to C., and that the defendants were therefore not liable.—*Hall v. North-Eastern Railway Co.*, L. R. 10 Q. B. 437.

See NEGLIGENCE.

REDEMPTION.—See ADEMPMENT ; ANNUITY.

RENT.

When a landlord distrains for rent, he cannot bring an action for rent so long as he holds the distress, although the distress is insufficient to satisfy the rent.—*Lchain v. Philpott*, L. R. 10 Ex. 242.

RECISSION OF CONTRACT.—See SALE.

RESULTING TRUST.

A woman transferred stock she had received from her deceased husband into the joint names of herself, her daughter, and her daughter's husband. She received the dividends on the stock until her death, which took place after her daughter's death. *Held*, that there was no resulting trust, and that the husband was therefore entitled to the stock.—*Baldstone v. Salter*, L. R. 10 Ch. 431, s. c. L. R. 19 Eq. 250.

SALE.

On Dec. 1, S. committed an act of bankruptcy ; and on Dec. 3 a petition for adjudication was filed and served. On Dec. 5, S. purchased wool at auction, and was allowed to take the wool without paying for it, as the seller supposed S. to be solvent. Dec. 14, S.

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was adjudicated bankrupt; and on Dec. 21, the seller, who had first heard of the bankruptcy proceedings on Dec. 19, gave notice that he rescinded the contract on the ground of fraud, and demanded to have the wool returned. *Held*, that, as it did not appear that S. purchased the wool without any intention of paying for it, the trustee was entitled to the wool.—*Ex parte Whittaker*; *In re Sackleton*, L. R. 10 Ch. 446.

See BILL OF LADING; CONTRACT; VENDOR AND PURCHASER, 1.

SET-OFF.

A debt due to an administrator in his own right may be set off against a sum due from the administrator in respect of the next of his kin's share of the intestate's estate.—*Taylor v. Taylor*, L. R. 20 Eq. 155.

SHIP.—See BILL OF LADING; CHARTER-PARTY.

SOLICITOR.—See ESCROW; MORTGAGE.

SPECIFIC PERFORMANCE.

In a suit for specific performance of a contract to purchase a colliery, it appeared that the income of the colliery was not so large as it was stated to be. Upon the circumstances of the case, it was decreed that the purchase-money be reduced by sum bearing the same proportion to the difference between the actual and the stated income as the contract price bore to the stated income.—*Powell v. Elliott*, L. R. 10 Ch. 425.

See VOLUNTARY SETTLEMENT.

STATUTE.—See CHECK; INFANCY; LORD'S DAY.

STOCK.—See RESULTING TRUST.

SUNDAY.—See LORD'S DAY.

TAX.—See RAILWAY 1.

TORT.—See TRUST.

TRESPASS.

The defendant was seated on the box of his carriage, by the side of his groom, who was driving. The horses became frightened and ran, and the groom begged the defendant to leave their management to him; and the defendant, accordingly, did not interfere. The horses came to a corner, and the groom endeavoured to help them in turning; but they fell, and struck the plaintiff, who was on the pavement on the farther side of the street into which the horses were turning. The jury found that none of the parties were guilty of negligence. *Held*, that the groom, by turning the horses in the direction of the plaintiff, was not guilty of trespass, inasmuch as he did not drive the horses against the plaintiff, but the horses struck the plaintiff in spite of the groom.—*Holmes v. Mather*, L. R. 10 Ex. 261.

See PRINCIPAL AND AGENT.

TRUST.

Bequest of an annuity of £100 charged on real estate to S., a married woman with separate property, in trust to pay and apply the annuity in her discretion for the benefit of J. during his life, and for his advancement, maintenance, or support, or otherwise for his benefit, and without being responsible or an-

swerable for any of the moneys so laid out, or the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same. *Held*, that S. was not entitled to any part of the £100 for her own use; but that there could be no decree against her separate property for a tort committed by her in the misapplication of the trust fund.—*Wainford v. Hayl*, L. R. 20 Eq. 321.

See RESULTING TRUST.

ULTRA VIRES.—See COMPANY.

VENDOR AND PURCHASER;]

1. A testator devised all his real and personal estate to trustees upon trust out of the proceeds of the personal estate, or if and so far as the same should be insufficient, out of the proceeds of his real estate, to pay his debts; and as to a property called Essex Lodge, to permit his widow to occupy the same during widowhood, and, after her second marriage or death, to sell the same. The debts were all paid from the personal estate. With the consent of the widow, the lodge was subsequently ordered to be sold, and a contract entered into accordingly. The purchaser objected to the title. *Held*, that the trustees could not pass a valid title.—*Carlton v. Truscott*, L. R. 20 Eq. 848.

2. An agreement was made for the sale of certain real estate, and the purchaser made a deposit. There was no agreement as to the forfeiture of the deposit in case of the contract failing through the purchaser's default. The purchaser became bankrupt, and the trustee in bankruptcy disclaimed the contract, and demanded the repayment of said deposit. *Held*, that the vendor was entitled to the deposit.—*Ex parte Barrell*; *In re Iarnell*, L. R. 10 Ch. 512.

3. Land was bid off at auction to the defendant, who paid a deposit. One of the conditions of sale was, that, should the purchaser fail to comply with certain other conditions, his deposit-money should be forfeited to the vendor, who should be at liberty to resell; and if the price which should be obtained by the second sale should not be sufficient to cover the amount bid at the first sale, and all the expenses incidental to the first sale, the deficiency should be paid by the purchaser at the first sale. The defendant insisted on being present at the execution of the deed of conveyance by the vendor, whose mind had at one time been affected. This was refused, and the defendant declined to complete the purchase. The jury found that it was not reasonable to insist on the presence of the vendor at the completion of the purchase. There was no resale. *Held*, that the purchaser had no absolute right to insist upon the presence of the vendor at the completion of the purchase; but that whether it was a reasonable requirement or not, was a question for the jury in each case; and that the vendor was entitled to recover the auctioneer's and solicitor's charges for the abortive sale, and to retain the deposit-money.—*Essex v. Daniell*, L. R. 10 C. P. 538.

See GRANT, 2; VOLUNTARY SETTLEMENT.

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Vis MAJOR.—See ACT OF GOD.

VOLUNTARY SETTLEMENT.

W. executed by indenture a voluntary conveyance of land; and the grantee covenanted that he would cause to be built upon the land such a dwelling-house as he should think fit. Subsequently W. contracted to sell the land to the plaintiff, who brought a bill for specific performance. *Held*, that, as the indenture contained no power of re-entry or penalty enforcing the covenant of the grantee, there was nothing binding in his contract, and the indenture was therefore a mere voluntary settlement; and that the plaintiff was entitled to a decree for specific performance.—*Rosher v. Williams*, L. R. 20 Eq. 210.

WARRANT.—See LIEN.

WATER.—See ACT OF GOD.

WAY.—See GRANT, 2.

WHARFINGER'S CERTIFICATE.—See LIEN.

WILL.

1. A testator bequeathed certain leasehold houses in trust for his children. After his death, it was found that the description of one of the houses on the second page of the will was struck through with a pen, the testator's name being written above the alteration. On the last page of the will a clause was interlined, giving said house to testator's wife. After the signatures of the testator and the witnesses was a memorandum, stating, "In No. 2 page, No. 1, W. Terrace [the above house] is struck out for the benefit of my dear wife." This memorandum was signed by the testator, and duly witnessed. *Held*, that the memorandum sufficiently referred to the interlineation on the last page of the will, and probate was granted to the will with the obliteration and interlineation.—*In the Goods of Treby*, L. R. 3 P. & D. 242.

2. A testatrix requested two witnesses to sign a paper for her, but did not say that the paper was her will, or that she had signed it; and the witnesses did not see her signature on the paper. There was not a complete attestation-clause, but only the words, "witness my hand this 28 May, 1873." Probate was refused on the ground of insufficient attestation.—*Fischer v. Popham*, L. R. 3 P. & D. 246.

3. Two wills were prepared for two sisters. By mistake, the deceased signed the will prepared for her sister. The wills were nearly, but not quite identical. Probate refused.—*In the Goods of Hunt*, L. R. 3 P. D. 250.

See ADEMPMENT; ANNUITY; CONDITION; DEVISE; LEGACY; VENDOR AND PURCHASER.

WORDS.

"Die leaving issue."—See DEVISE, 2.

"Die without issue."—See DEVISE, 2.

"Land."—See RAILWAY, 2.

"Leaving no issue."—See DEVISE, 3.

"Lying Days."—See CHARTER-PARTY, 2.

"Place used for public entertainment or amusement."—See LORD'S DAY.

"Their Death."—See LEGACY.

COURT OF APPEAL.

ORDERS AS TO COUNTY COURT APPEALS.

February 25th, 1876.

Appeals from County Courts shall be heard at the sittings of the Court of Appeal next after the giving of the decision appealed from, unless otherwise ordered by the Court of Appeal or a Judge thereof.

The appellant shall set down the appeal for hearing, by delivering to the Registrar of the Court of Appeal, at least fourteen days before the sittings at which the matter is to be heard, four appeal books for the use of the Judges of the Court of Appeal. Such appeal books shall, if written, be written on brief paper, and on only one side of the paper; and if printed, shall be printed on good paper, on one side of the paper only, and in demy-quarto form, small pica type leaded. And each book shall contain a copy of the pleadings, evidence, and other matters which have been certified by the Judge of the Court appealed from, together with the appellant's reasons of appeal. The copy, certified by the Judge in pursuance of the statute, may be accepted as one of the four appeal books, if it complies with the above mentioned requisites.

The appellant shall at least eight days before the sittings at which his appeal is to be heard, serve the respondent with notice of the setting down of the appeal, and with a copy of his reasons of appeal.

Unless the foregoing rules are complied with, the appeal shall not be heard, unless the Court shall, on application made upon two days' notice to the respondent, otherwise order.

The costs to be taxed and allowed upon appeals from County Courts shall be on the same scale as heretofore allowed upon appeals to the Courts of Queen's Bench and Common Pleas.

W. H. DRAPER, C. J.

GEO. W. BURTON, J.

C. J. PATTERSON, J.

THOMAS MOSS, J.

LAW SOCIETY, MICHAELMAS TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, MICHAELMAS TERM, 30TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law :
No. 1342—KENNETH GOODMAN.

THOMAS HOKACE MCGUIRE.
GEORGE A. RADENHURST.
ERWIN HAMILTON DICKSON.
ALEXANDER FERGOUSON.
DENNIS AMBROSE O'SULLIVAN.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit.

The following gentlemen received Certificates of Fitness :

THOMAS C. W. HASLETT.
ANGUS JOHN MCCOLL.
DENNIS AMBROSE O'SULLIVAN.
DANIEL WEBSTER CLENDENAN.
GEORGE WHITFIELD GROTE.
CHARLES M. GARVEY.
ALBERT ROMAINE LEWIS.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

No. 2585—GOODWIN GIBSON, M.A.
JOHN G. GORDON, B.A.
WALTER W. RUTHERFORD, B.A.
WILLIAM A. DONALD, B.A.
THOMAS W. CROTHERS, B.A.
JOHN B. DOW, B.A.
JAMES A. M. ATKINS, B.A.
WILLIAM M. READE, B.A.
EDMUND L. DICKINSON, B.A.
CHARLES W. MORTIMER, B.A.

Junior Class.

ROBERT HILL MYERS.
WILLIAM SPENCER SPOTTON.
WILLIAM JAMES T. DICKSON.
WILLIAM ELLIOTT MACARA.
JAMES ALEXANDER ALLAN.
WALTER ALEXANDER WILKES.
WILLIAM ANDREW ORR.
ALFRED DUNCAN PERRY.
JAMES HARTY.
HERBERT BOLSTER.
JOHN PATRICK EUGENE O'MEARA.
CHARLES AUGUSTUS MYERS.
CHARLES CROSBIE GOING.
DAVID HAVELOCK COOPER.
EMERSON COATSWORTH, JR.
WILLIAM PASCAL DESROCHE.
FREDERICH WM. KITTERMASER.

Articled Clerk.

JOHN HARRISON.

Ordered. That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3 ; Virgil, *Æneid*, Book 6 ; Cæsar, Commentaries, Books 6 and 8 ; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination on the following subjects :—Cæsar, Commentaries Books 5 and 6 ; Arithmetic ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams ; Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills) ; Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 28, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows :—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR APRIL.

2. SUN... 5th Sunday in Lent.
3. Mon... County Court Term begins. County Court sittings in trial without Jury.
5. Wed... Canada discovered, 1499. Last day for Secretary of Law Society to receive voting papers for Benchers.
6. Thur... Election of Benchers by Bar (84 Vict., c. 16).
8. Sat... County Court Term ends. Trinity College Lent Term ends. Last day notice primary examination.
9. SUN... 6th Sunday in Lent.
14. Frid... Good Friday. Princess Beatrice born, 1857.
16. SUN... Easter Sunday.
17. Mond... Easter Monday.
18. Tues... Easter Tuesday.
22. Sat... Trinity College Easter Term begins.
23. SUN... 1st Sunday after Easter. Princess Alice born, 1843.
24. Mond... Earl Cathcart, Governor-General, 1846.
25. Tues... University of Toronto, Session of Senate begins. Parliament Buildings at Montreal burnt, 1849.
27. Thur... Battle of York, 1813.
29. Sat... Candidates for Attorney to leave papers with Secretary Law Society.
30. SUN... 2nd Sunday after Easter.

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THE

Canada Law Journal.

Toronto, April, 1876.

OUR readers will notice in this number the first instalment of the "Notes of Cases," directed by the Law Society to be published in this journal. Hereafter they will appear with regularity, and give the profession earlier information of recent decisions than has heretofore been possible.

PROBABLY before this reaches our readers the election for Benchers will have taken place, and the result known. We may have something further to say on the subject by and by; but at present we cannot say that we have much reason to recede from the position we took some years ago, viz.: that "The game is not worth the candle."

WE are glad to learn that His Honour Judge Gowan has been added to the Commission for Consolidating the Statutes of Ontario, and is taking an active part in the revision of the work already done, and in suggestions for its future prosecution. Probably no man in Canada could be found who is more familiar with the statute book; and his ripe judgment, and the experience gained by him when on the Commission for the Consolidation of the Statutes of old Canada will be of the greatest benefit. We congratulate Mr. Mowat on securing his services.

WE notice in the *Albany Law Journal* a very commendatory notice of Mr. Rogers' book on the "Wrongs and Rights of a Traveller." We are glad to see a work of so much merit, and written by a Canadian author, so well appreciated by such a competent authority. It is spoken of as not only "pleasantly and entertainingly" written, but also "as in

EDITORIAL ITEMS.

some respects the best law book extant on the subjects treated, thoroughly accurate, reliable, and learned."

A CORRESPONDENT of the *Chicago Legal News* congratulates the State of Illinois upon throwing open to women the doors of the legal profession. Some little matters of detail seem now to trouble them, however, for the writer propounds the question whether it would not be proper etiquette for "lady lawyers" to take off their hats in court and address the Courts uncovered. A writer in the last number of *Blackwood*, when desiring women to remain covered "because of the angels," advocates the theory that what is meant by angels is loose spiritual characters, who are roaming about without bodies. In a country where spiritualism is as rampant as it is in the United States, we should think a decent covering all the more necessary, although probably in St. Paul's time the "natural" covering was not (to use a Boyle-Rochism) artificial, as it is in these days.

We are indebted to the courtesy of Mr. Cassels, the Registrar of the Supreme Court, for a copy of the General Rules and Orders of the Exchequer Court of Canada in book form. They seem to provide a complete code of procedure. But as we have not yet had an opportunity of examining them fully, we are prepared, knowing the capacity of those who probably have had most to do with them, to take them on trust. When we say that there are no less than 261 rules, the amount of labour involved in their preparation will be seen. The Supreme Court Rules have already been published in this journal. The tariffs of fees in the Supreme Court, and in the Exchequer Court for attorneys, solicitors and counsel, will be found in another column. We have not space to publish the Exchequer Court Rules, or the tariffs for the officers of the court.

ON the third day of the present month the changes in the Court of Chancery which we spoke of as being in contemplation were completed by the appointment of Mr. R. P. Stephens as Referee, Mr. Holmsted as Registrar of the Court of Chancery, and Mr. Grant as Registrar of the Court of Appeal.

THE following are the names of the recently appointed Queen's Counsel — thirty-five in all. Richard Martin, Hamilton; Thomas Scatcherd, London; Robt. Lees, Ottawa; Francis R. Ball, Woodstock; Alexander Morris, Perth; Frederick Davis, Sarnia; Edward Martin, Hamilton; Henry B. Beard, Woodstock; Thomas Wardlaw Taylor, Toronto; Francis McKelcan, Hamilton; Wm. Kerr, Cobourg; Byron Morgan Britton, Kingston; Edmond J. Senkler, Brockville; Malcolm Colin Cameron, Goderich; Timothy Blair Pardee, Sarnia; Wm. H. Scott, Peterboro'; William Ralph Meredith, London; Warren Rock, London; Wm. Lount, Barrie; John G. Scott, Toronto; James Bethune, Toronto; Jas. Kirkpatrick Kerr, Toronto; Britton B. Osler, Hamilton; Thomas Deacon, Pembroke; James S. Sinclair, Goderich; Thos. Ferguson, Toronto; Jno. Alexander Boyd, Toronto; James F. Dennistoun, Peterboro'; Hugh McMahon, London; David Glass, London; John Idington, Stratford; Arthur Sturgis Hardy, Brantford; Christopher Finlay Fraser, Brockville; Donald Barr Maclellan, Cornwall; Donald Guthrie, Guelph. The old joke is applicable—that as there are so many of them, they should appear in robes of "watered silk."

Nor very long ago an application was made in Practice Court to set aside an award, one of the grounds being misconduct on the part of the arbitrator, a County Judge, in that he had during the hearing of the case dined with the counsel of the party in whose favour the

BENCH AND BAR—QUEEN'S COUNSEL.

award was subsequently made. Counsel in shewing cause to the rule, spoke very strongly on the impropriety of making an innocent and proper courtesy on the part of the counsel at the hearing (who was "at home," and had asked both his opponent and the arbitrator to partake of his hospitality, though the former was accidentally unable to be present) a foundation for laying a charge of misconduct on the part of the arbitrator. Shortly after hearing the argument we noticed some appropriate remarks in the *Irish Law Times* when speaking of a somewhat similar incident detailed in the *New York Herald*, and thus commented on in the latter sheet:

"An unpleasant report comes to us from Washington, which we mention with some hesitation. It is that shortly after the argument before the Supreme Court on the Union Pacific Interest Case was completed, and before the decision was rendered, the whole Court, including also its clerk, dined with the principal counsel of the railroad, and that later, but still before the decision was given, several members of the Court dined with Mr. Sam. Ward. Of course we do not for a moment pretend to think that the Supreme Court was influenced in its views on this important case by these dinners. But we take the liberty of telling the judges that such dining as we speak of was, under the circumstances, improper. It gives rise to unpleasant remarks about the members of a tribunal which Americans have been accustomed to venerate and look upon with pride. * * *

It is certainly an impropriety that members of the Supreme Bench should dine with the counsel or agents in an important case, pending their decision; and, when we consider in this case the immense interests involved—the eagerness of speculators to get in advance at the mind of the Court, and the effect of a dinner to unloose the tongues of even the most prudent men—we do not wonder that Washington gossips are just now retailing stories which would, if they should hear them, vex and mortify the judges, and which certainly should warn them to be more decorous and reserved in the future."

The *Irish Law Times* demurs to this language in the following sensible observation:—

"It is just possible that the editor of the *Herald* is a little too fastidious. In England, where the

judges are like Cæsar's wife, above suspicion, every barrister of any respectability attending a session of the Court at circuit, dines with the judge on some day of the term. And what is more, we are credibly informed that it is the practice to talk over the business before the Court at those dinners. But in that country the judges are paid decent salaries, and are therefore enabled to invite the Bar to dine with them. In this country this is not so; and hence, if the judges and Bar would dine together, it must generally be on invitation of the wealthier members of the Bar. The fact that a man is a judge ought not to deprive him of the pleasures of social intercourse. The way to make our judges honour themselves is to pay them well, honour them, invite them out, dine them, keep them in good society, and especially keep them in public as much as possible. The policy which would starve a judge, and at the same time cage him like a criminal, would soon turn him from an honest man into a rogue."

Possibly, however, the Americans are the best judges of what is or is not desirable in the premises as to their own country. Dining out, whether in public or in private, is not such an "institution" with our business engrossed neighbours as it is with the "true Britisher," and when it occurs with the former it seems necessary to give some reason for the novelty.

QUEEN'S COUNSEL.

It is our duty to chronicle the fact that on 11th March eighteen gentlemen, who had already received patents as Queen's Counsel from the Governor-General as representing the Queen, were appointed by the Lieutenant-Governor of Ontario to be Her Majesty's Counsel learned in the law. They are described in the *Gazette* simply as barristers, the patents which they had previously received from the Governor-General being therefore ignored. On the 13th March thirty-five barristers of Ontario were also appointed to the like office by the Lieutenant-Governor. This practically is the creation by the Ontario Government of fifty-three

QUEEN'S COUNSEL.

Queen's Counsel at the one time. Such a wholesale manufacture of "silks" has probably never before been witnessed even in England, where they have about as many thousand barristers as we have hundreds.

It is becoming a matter of little consequence in Canada as to who are entitled to this distinction. If the practice which has grown up of late years continues for some time longer, there will be no inclination to go to the expense of buying silk gowns, except so far as it may be a convenience to the wearer to get an early motion in court.

It may be interesting at this time to review the appointments that have been made during the last thirty-five years in Upper Canada. In 1841 Mr. Draper created two Queen's Counsel; in 1842, five; in 1845, one; and in 1846, five. In 1848 Mr. Baldwin created one; in 1849, one; and in 1850, nine. Mr. Ross afterwards made three. Mr. John A. Macdonald in 1855 appointed one; in 1856, twelve; in 1858, four; and in 1862, two. In 1863 Mr. John Sandfield Macdonald created ten, and in 1867, thirteen. In 1872 Sir John A. Macdonald appointed eighteen; and in 1874, six; and now in 1876, Mr. Mowat appoints thirty-five new men, with eighteen formerly appointed by the Dominion Government, making fifty-three in all. There are now between seven and eight hundred practising barristers in Ontario, and eighty-two Queen's Counsel, being a proportion of a trifle over one to nine. In England the proportion is about one to thirty-five.

The very numbers are condemnatory. That which is common is never very highly valued. To be a Queen's Counsel is rapidly ceasing to be an honour, and an honourable distinction is becoming a by-word; that which had been lowered by previous Governments has been made

valueless, and that by a Government at the head of which is one of whom the profession had a right, from his recent high position, to expect better things. We claim the right to think that he must feel that a great mistake has been made, perhaps owing to great pressure, and that pressure, it is openly asserted and we cannot otherwise account for it, of a political nature. Queen's Counsel have been appointed before now that have tended to bring the order into disrepute, but the climax has been reached by the list that has just been published.

We do not mean to say that some of these gentlemen are not entitled to the distinction, nor but that some of the rest would possibly be so in the course of years. But most certainly a large number are not now entitled to it. Some who were quite as much entitled to the distinction as the best of those appointed, and vastly more so than the majority of them, have been left out. The standard in this country has for many years been too low, much lower than in England, and far lower than even the different circumstances of the two countries warrant. As long ago as 1863 we drew attention to this subject, and deprecated some appointments that had then been made; but if there was cause of complaint then, and occasionally since then, there is ten times more cause for censure now. We then drew a distinction between *requirement* for the position and the *incidents* that should attend it. Respectability and a certain length of standing at the Bar are necessary incidents, but the requirement is *merit*. The position, in our judgment, is such that it should only be held by those who are, in the opinion of their brethren, on the high road to the Bench. The appointments should, in fact, be made with so much discrimination, that not only should we look to the ranks of Queen's Counsel for Judges, but the former should be so superior to their

SUITS "BENEATH THE DIGNITY OF THE COURT."

brethren that they should be looked upon as a class holding a position half-way between the Bench and the Bar. We admit that this standard would vastly reduce the number of silks; be it so, but silks would then be worth having, and there would be some inducement for men to excel amongst their fellows, and to gain the homage of their brethren, which to a true lawyer is vastly better worth having than the possession of a large practice or the popularity gained by victories at *nisi prius*.

SUITS "BENEATH THE DIGNITY OF THE COURT."

(First Paper.)

THE maxim "*de minimis non curat lex*" is one peculiarly applicable to matters in controversy which, because of their insignificance, the Courts refuse to entertain. The reason of this is based on the principle of jurisprudence that it is the duty of judges to discourage litigation unimportant and mischievous in itself, and also detrimental to the interests of other suitors, whose causes are thereby delayed: *Eltham v. Kingsman*, 1 B. & Ald., 687.

The business of the Courts, as has been well said by Story, is to administer justice in matters of grave interest to the parties, and not to gratify their passions or their curiosity, or their spirit of vexatious litigation. Rolfe B. explains what is meant when it is said that causes are beneath the dignity of the Court. It does not mean that the Courts lose dignity by entertaining questions involving a small pecuniary amount, but it expresses what every one must feel the force of—namely, that a large sum of money would be spent in carrying on a proceeding which would not be worth the expense: *Stutton v. Bament*, 3 Exch. 834.

No doubt there are classes of cases (more common in former times than now) wherein the Courts were in the fair way of losing their dignity, when condescending to entertain them. These were commonly disputes about wagers; and under this head of law a very curious and amusing chapter might be written. Lord Kenyon allowed an action to be tried before him to recover a small sum of money lost by the defendant to the plaintiff at the game of all-fours: *Bulling v. Frost*, 1 Esp. 235. In *Pope v. St. Leger*, 1 Salk. 844, an action was tried by Lord Chief Justice Holt on a wager whether a person playing at backgammon, having stirred one of his men without moving it from the point, was bound to play it; and, according to some authorities, the venerable judge called in the assistance of the groom-porter to decide the controversy: (see *Hussey v. Crickitt*, 3 Camp., at p. 171). In this very case of *Hussey v. Crickitt* there is perhaps more humour than in any of the others. The full Court there with some hesitation determined that an action may be maintained upon a wager of "*a rump and a dozen*" whether the defendant be older than the plaintiff. The witnesses at the trial proved that a *rump and a dozen* meant a good dinner and plenty of wine for the persons present. Sir James Mansfield said: "I am inclined to think I ought not to have tried this case. While we were occupied with these trifling disputes, parties having large debts due to them, and questions of great magnitude to try, were grievously delayed." Mr. Justice Heath, however, regarding the question rather in a social point of view, saw nothing immoral in a wager about a good dinner, and thought the parties entitled to come to the court.

In *Henkin v. Guerss*, 12 Ea. 247, the judges refused to try an action on a wager upon an abstract question of law or judicial practice not arising out of cir-

SUITS "BENEATH THE DIGNITY OF THE COURT."

cumstances really existing. A wager by a student that he would not pass the examination of persons applying to be admitted as attorney, was held to be insufficient as a foundation for an action in *Fisher v. Waltham*, 7 Jur. 625.

Lord Ellenborough laid down the principle in this class of cases in a manner more consonant to common sense than in some of the other cases above cited. In *Squire v. Whirken*, 3 Camp. 140, he refused to proceed with a case of money had and received for a wager on a cock-fight. "This must be considered," he said, "a barbarous diversion which ought not to be encouraged or sanctioned in a court of justice. There is likewise another principle on which I think such an action on such wagers cannot be maintained. They tend to the degradation of courts of justice. It is impossible to be engaged in ludicrous inquiries of this sort consistently with that dignity which it is essential to the public welfare that a court of justice should always preserve. I will not try the plaintiff's right to recover the four guineas." So Lord Tenterden, on the same principle, refused to try a case involving an inquiry as to the powers of a once celebrated dog named Billy. Sir Vicary Gibbs also, when Chief of the Pleas, stopped a case in course of trial before him, on a wager that Joanna Southcote would be delivered of a male child before a certain day. "So! I am to try the extent of a woman's chastity and delicacy in an action on a wager. Call the next case!" *Ditchtown v. Goldsmith*, Annual Register, vol. 57 (1815) p. 289. This case, moreover, trenching upon the objections that prevailed in *Du Costa v. Jones*, Cowp. 729. There the Court held that an action could not lie upon a wager as to the sex of the Chevalier D'Eon, on the ground that an inquiry therein would involve the reception of indecent evidence,

and on the further ground that such an inquiry would tend to disturb the peace of the individual and of society. But, the Court went on to say, the indecency of the evidence is no objection to its being received, where it is necessary to the decision of a civil or criminal right: *Anon.* 29 U.C.Q.B., 456.

There are again other classes of cases at law, in regard to which the sum claimed determines the jurisdiction. The general rule, well established at law, is that it is beneath the dignity of the superior courts to hold consuance of pleas under forty shillings. There is indeed an express statute prohibiting jurisdiction in trespass for goods below this amount: 6 Edward I., cap. 8. In Chancery, as we shall presently more fully consider, the limit of the jurisdiction was declared to be ten pounds. The course is to move to stay the proceedings upon affidavit, if the objection does not appear on the face of the record. But if there is any dispute as to the facts, the Court is slow to interfere summarily: *Oulton v. Perry*, 3 Burr 1592; *Branker v. Massey*, 2 Pri. 8; *Lowe v. Lowe*, 1 Bing. 270, where the Court gave no relief in an action of trover.

The exceptions from this class of cases may be ranked under two heads: 1. The Court will not stay the proceedings if it appears that the debt is not recoverable in any inferior court. This is for the obvious consideration that the smallness of the sum is no reason why the plaintiff should lose his claim: *Eames v. Williams* 1 D. & R. 359; *Tubb v. Woodward*, 6 T. R. 675; *Harwood v. Lester*, 3 B. & P. 617. 2. In matters relating to injuries to realty the Court holds that the maxim *de minimis* does not apply. In *Clifford v. Hoare*, 22 W. R., 831, Brett J. says, "I desire to guard myself from lending authority to the contention that this maxim can be held to apply to land

THE HERO OF ENGLISH LAW REFORM.

as well as to other descriptions of property, in reference to which actions to recover for damages for injury may be brought. On the contrary, ever so little an encroachment on the soil would entitle the plaintiff to seek protection by the interference of the Court."

(To be continued.)

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"'HAVE I a genius for legislation?' I gave myself the answer, fearfully and tremblingly, 'Yea.'" At the early age of twenty Jeremy Bentham came to this decision. The mode in which he arrived at it, is strikingly illustrative of the earnestness of purpose that marked his life from its beginning. He had been asked to define genius for the entertainment of his friends, before whom he was displaying his youthful precocity. At the time he was unable to do so, but subsequent reflections on its etymology convinced him that its proper meaning was "production." He then set himself to consider what was the most important earthly pursuit, and adopted the opinion of Helvetius, that it is legislation. His life was thenceforth devoted to that work, and he amply justified the decision which his self-knowledge had led him to arrive at so early in life. He was called to the bar, but the natural disgust of a mind inspired by an intense love of justice with the irrational mode in which it was then administered, quickly drove him from the profession. On one occasion, he found that an opinion he had given, which was right according to all the accessible authorities, was proved wrong by the production of a decision, recorded only in a secret manuscript. Such an occurrence was not infrequent before the system of official reporting was intro-

duced. In his twenty-second year, he happily discovered a phrase which served as a guiding star to his labours and the watchword of his faith. "The greatest happiness of the greatest number," a phrase found in the writings of Priestley, had as great an influence upon his mind as the sentence "*securus judicat orbis terrarum*" had subsequently in determining the direction and ultimate goal of Newman's opinions. Sir Roland Wilson, in his excellent "History of Modern Law," justly observes that Bentham's phrase, which has been the subject of so much ridicule by Carlyle and others, substantially denotes the same thing to which others prefer to apply such terms as right, duty, justice, will of God.

Bentham, in his sixteenth year, had listened to a few of the lectures of Sir William Blackstone, and his first work was an attack on that author's theory of government, contained in the introductory chapter of his "Commentaries." This "Fragment on Government," in its re-translation from the French of Dumont, is now perhaps the best known of Bentham's works, and at the time of its anonymous publication in 1776, attracted great attention, and was attributed by some to Lord Mansfield. His next appearance was on Blackstone's side, in an endeavour to make his *Hand Labour Bill* intelligible to the public, and to excite public interest in the objects it had in view. After the termination of his relations with Lord Shelburne, he withdrew into the strictest privacy for the remainder of his life, which reached the mature age of eighty-three, avoiding society and all personal contact with his opponents. The obvious disadvantages of this plan of life greatly marred his work. "Paying little attention to the labours of others, and working out every problem for himself, he occasionally announced things generally known with the air of an original discoverer. The seclusion

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which saved him from personal bitterness made him sometimes unjust to whole classes, leading him to impute to bad motives what was really the result of a very natural ignorance, and to fancy that what was plain to him from his lofty tower of speculation, must be equally so to those who were toiling in the labyrinth below; for *tact* cannot exist without *contact*."

His style suffered a fatal change from the same cause. Abandoning the clear and simple style of his earlier writings, he adopted a mode of expression which caused him to be popularly regarded, to use the words of Sir William Taylor, "as a gentleman who wrote bad English and delighted in paradox." His eccentricities of style, his ignorance of other men's labours, and his appetite for flattery, provoked needless antagonism. Nor could the independence and economy of time which his strict seclusion secured, counterbalance the evil effects indicated. But in spite of all drawbacks, his work proved more immediately beneficent than perhaps that of any other writer the world has seen. Law reform is inseparably associated with his name, and the force of his exertions in that direction has not yet been exhausted.

His views on some points, which have not yet been embodied in legislative enactments, are worthy of notice. The principles of evidence he laid down have been to a great extent adopted, and if logic had its habitation in parliaments, would be carried to their logical conclusions. Bentham would not exclude any person from giving testimony, and in his opinion the reasons which he urged for the admission of the evidence of parties in civil cases, applied equally to the accused in a criminal prosecution. He would not protect witnesses against questions imputing crime, nor reject confidential communications be-

tween husband and wife, for it is not in the interest of justice to encourage wrongdoers; nor between solicitor and client, as such disclosures would prevent lawyers from lending themselves to schemes of injustice. He would have the suffering party in every case compensated, and his costs paid, if necessary, out of the public exchequer. For judicial positions he would not select successful advocates, but fill them with men specially trained for such functions. We are gradually approaching a state of things in which, as he recommended, the field of distribution of justice is local not logical, and have even advanced some steps toward making the courts accessible at every hour of the day or night; and many a vice-chancellor dragged from his dinner-table to hear an injunction motion, or magistrate roused from his slumbers to grant an order for an arrest, has recognised the beauty of the principle, that "justice should sleep only when injustice sleeps also."

The progress of law reform has been rapid since Bentham's death, and its pace shows no sign of slackening. The conclusion which Bentham's examination of the law of his day and the mode of its administration, led him to, was that the provisions of Magna Charta—"We will sell to no man, we will deny to no man, justice or right,"—had been forgotten, and that justice was "denied to nine-tenths of the people, and sold to the remaining tenth at an unconscionable price." Thanks to the labours of Bentham and of the men who received and handed on the torch of law reform, the administration of justice in our day is not open to this reproach.

"Let one devil torment the other," said my Lord Keeper Egerton to a question asked him, what should become of the broker; both broker and usurer had conspired to cot in a young gentleman.

THE BALLOT: SECRECY AND PERSONATION.

THE BALLOT: SECRECY AND PERSONATION.

CHIEF JUSTICE HARRISON, in a judgment recently delivered on an application to unseat an alderman of the city of Toronto (*Reg. ex rel. Riddell v. Burke*), and containing an able review of the questions of facts presented, spoke of two things during the inquiry which struck him as remarkable:

(1) The ability of poll clerks, scrutineers and others to tell for whom voters had voted, notwithstanding the provisions of the Ballot Act; and (2) the facility for personating voters.

As to the first point, the essence of the ballot system is secrecy; if secrecy in voting is not obtained, it is devoid of that which is the redeeming feature of a scheme which contains many inducements to lying and deceit, and is in other ways repulsive to the manly instincts of the Anglo-Saxon race. As to the first point, it will be difficult to prevent scrutineers who know their business, or poll clerks who live, as is generally the case at municipal elections, in the neighbourhood of the polling subdivision, from forming a tolerably correct estimate of how the vote is going from time to time, or even as to how doubtful men record their votes. There are a hundred ways in which this can be done by any one familiar with such matters. For example: the person with whom the voter may be seen before voting, marks opposite the voter's name in the canvass books, the mode in which the opposing scrutineer addresses him, casual observations, and putting two and two together, &c. We happen to know of a scrutineer at a recent Parliamentary election, who (comparatively a stranger in the immediate neighbourhood, but an "old hand"), as the polling went on, marked down privately how he thought

each man had voted, and then stated what he believed would be the result; and when the ballots were counted, he was proved to be within one of the correct number. This was, of course, to a certain extent an accident, but it is an example of our proposition that the want of secrecy remarked upon by the learned Chief Justice is not so much attributable to defects in the system or its working as might be supposed.

We quite agree, however, that (quoting from the words of the judgment)

"If personation of votes is to be prevented, the act must be amended so as to furnish machinery for the ready detection and adequate punishment of persons guilty of this vile practice."

The Chief Justice then continues:—

"It is by the English Statute 13 and 14 Vict., cap. 69, ss. 92, 93, for the more effectual detection of the personation of voters at elections, provided that any candidate at any election to serve in Parliament may appoint agents to attend polling booths for the purpose of detecting personation; that if any such agent, at the time any person tenders his vote, or after he has voted, and before he leave the polling booth, declare to the returning officer that he verily believes, and undertakes to prove, that the person so voting is not in fact the person in whose name he assumes to vote, the returning officer is required, immediately after such person shall have voted, by word of mouth to order any constable, or other peace officer, to take the person so voting into custody; and provision is in the same act made for the immediate hearing before Justices of the Peace, and committal for trial or discharge of the person accused, and in the latter case compensation paid for damages and costs.

"The greater the secrecy in vote by ballot, the greater the difficulty of discovering for whom the vote was cast, and the greater the danger of personation. But where it is proved that there was personation, and for whom the personator voted, there is no good reason in a scrutiny against holding such vote invalid, and rejecting it.

"Besides, personation in Parliamentary elections is in England now made a *felony*, and the person convicted thereof is liable to be punished by imprisonment for a term not exceeding two

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years with hard labour: Imp. Stat. 35 and 36 Vict., cap. 33, sec. 24.

"There is no act which makes the personator incompetent as a witness, but I think the evidence of such a person should be received with great caution. If there were no corroboration of the evidence of Stanley [whom the Chief Justice found guilty of four distinct acts of personation during this election], I should have some hesitation in giving effect to it. But as it has been corroborated in several material particulars, I cannot disregard it."

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THE following is the correspondence recently brought before the House of Commons, having reference to the inadequacy of the existing Extradition Treaty between Great Britain and the United States:

Memorandum for the Privy Council by the Minister of Justice.

DEPARTMENT OF JUSTICE,
OTTAWA, 2nd Dec., 1875.

The undersigned begs to report that his attention has been called to the inadequacy of the existing Extradition Treaty between the United Kingdom and the United States.

By what is commonly called the Jay Treaty, made in 1794 between Great Britain and the United States, there were two extradition offences, viz: Murder and forgery. By the Ashburton Treaty, made in 1842, there were seven extradition offences, viz: Murder, assault with intent to commit murder, piracy, arson, robbery, forgery, and the utterance of forged papers.

In 1870 was passed the Imperial Statutes 33 and 34 Vict., cap. 52, intitled an Act to amend the Law relating to the Extradition of Criminals, by the first schedule to which the following were specified as extradition offences:

Murder, and attempt and conspiracy to murder, manslaughter, counterfeiting and altering money, and uttering counterfeited or altered money, forgery, counterfeiting and altering and uttering what is forged or counterfeited or altered, embezzlement and larceny, obtaining money or goods by false pretences, crimes by

bankrupts against bankruptcy law, fraud by a bailer, banker, agent, factor, trustee, or director or member, or public officer of any company made criminal by any act for the time being in force; rape, abduction, child-stealing, burglary and house-breaking, arson, robbery with violence, threats by letter or otherwise with intent to extort, piracy by law of nations, sinking or destroying a vessel at sea, or attempting or conspiring to do so, assaults on board a ship on the high seas with intent to destroy life or to do greivous bodily harm, revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

In 1873 was passed the Imperial Statute 36 and 37 Vict., cap. 60, by the schedule to which the following were specified as extradition offences: Kidnapping and false imprisonment; perjury and subornation of perjury, whether under common or statute law; any indictable offence under the Larceny Act, 1861, or any act amending or substituted for the same which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter 97, "To consolidate and amend the Statute Law of England and Ireland, relating to malicious injuries to property," or any act amending or substituted for the same, which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter 98, "To consolidate and amend the Statute Law of England and Ireland, relating to indictable offences by forgery," or any act amending or substituted for the same which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the Act 24 and 25 Vict., cap. 99, "To consolidate and amend the Statute Law of the United Kingdom against offences relating to the Coin," or any act amending or substituted for the same which is not included in the first schedule of the Extradition Act of 1870; any indictable offence under the Act 24 and 25 Vict., cap. 100, "To consolidate and amend the Statute Law of England and Ireland, relating to offences against the person," or any act amending or substituted for the same, which is not included in the first schedule to the Extradition Act of 1870; any indictable offence under the laws, for the time being, in force in relation to bankruptcy, which is not

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included in the first schedule to the Extradition Act of 1870.

In the year 1872 an Extradition Treaty was made between the United Kingdom and Germany, embracing eighteen extradition crimes. In the same year an Extradition Treaty was made between the United Kingdom and Belgium, embracing nineteen extradition crimes. In the same year a treaty was made between the United Kingdom and Italy, embracing nineteen extradition crimes. In the same year an Extradition Treaty was made between the United Kingdom and Denmark, embracing nineteen extradition crimes. In the year 1873 an Extradition Treaty was made between the United Kingdom and Brazil, embracing eighteen extradition crimes. In the same year an Extradition Treaty was made between the United Kingdom and Sweden and Norway, embracing eighteen extradition crimes. In the year 1874 an Extradition Treaty was made between the United Kingdom and Austria, embracing twenty extradition offences. In the same year an Extradition Treaty was made between the United Kingdom and the Netherlands, embracing ten extradition offences. In the year 1875 an Extradition Treaty was made between the United Kingdom and the Swiss Confederation, embracing eighteen extradition offences.

The existence of the imperial statutes and treaties to which the undersigned has referred, renders it unnecessary for him to argue for the propriety, and in fact the necessity of enlarging the range of extradition offences in general. The relations in particular of the United States and Canada render applicable with added force to these countries in general considerations upon which these statutes and treaties have been based; the common frontier of about three thousand miles; the facilities for passing from the one country into the other; the condition of things in the sparsely settled but vast tracts of country in the West; the extensive commerce, both by land, by sea, and by the great lakes, and the increased intercourse between two peoples of a common tongue, all point to the conclusion that between them, perhaps, more than between any other two countries, an extensive Extradition Treaty is requisite. One great possible source of difficulty which probably prevented any effort to extend the existing treaty has been of late years removed by the abolition of slavery. All the experience of later years point towards the necessity of extension—cases are of very frequent occurrence, in which persons guilty of serious crimes pass from one country into the other; and almost

within sight of their victims and of the country whose laws they have offended, find a secure refuge for themselves and their ill-gotten gains. The facilities so offered for crimes of a particular character tend largely to increase their number, and so at once foster crime and render property less secure.

The undersigned suggests to Council that it is expedient to take such steps as may be best calculated to result in the making of a comprehensive Extradition Treaty between the United Kingdom and the United States, framed with due regard to the exceptional circumstances as between the United States and Canada, to which the undersigned has alluded.

The undersigned has thought it best not to encumber this memorandum by a discussion of the precise crimes to be embraced in such a treaty, or by suggestions as to the phraseology to be used in defining them. These matters would be the subject of negotiation, and in settling them it might be necessary to refer to the Canadian Consolidation of the Criminal Law.

Nor does the undersigned embrace in this report any observations as to the mode of extraditing offenders.

Upon this important subject he proposes, in case steps be taken for the negotiation of a treaty, to lay before the Council a separate memorandum.

(Signed)

EDWARD BLAKE.

The Earl of Carnarvon to the Earl of Dufferin.

DOWNING STREET

2nd February, 1876.

MY LORD,—I have been in communication with the Secretary of State for Foreign Affairs in regard to the Minute of the Privy Council of Canada, enclosed in your despatch, No. 176, of the 11th of December, submitting for the consideration of Her Majesty's Government the inadequacy of the existing Extradition Treaty between this country and the United States, and suggesting the expediency of taking steps for the negotiation of a more comprehensive treaty, due regard being had to the exceptional circumstances of Canada and the United States.

I now enclose for your information and for that of your Government a copy of a letter from the Foreign Office, stating the result of recent negotiations with the United States Government on the subject, and that in the Earl of Derby's

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opinion there is at present little hope of concluding a new treaty with the United States.

It will be seen, however, that his Lordship will not fail, should a favourable opportunity occur, to press upon the United States Government the expediency of concluding a more comprehensive treaty than the existing one, an arrangement which, in the opinion of Her Majesty's Government, would be as much to the advantage of the United States as to this country and the Dominion.

I have, &c.,

(Signed),

CARNARVON.

Governor-General,

The Right Honourable

The EARL OF DUFFERIN, K.P., K.C.B.

The Foreign Office to the Colonial Office.

FOREIGN OFFICE,

January 29, 1876.

SIR,—I have laid before the Earl of Derby your letter of the 19th instant, in which you inclose copy of a despatch from the Governor-General of Canada, together with a Minute of the Privy Council of the Dominion, submitting for the consideration of Her Majesty's Government the inadequacy of the existing Extradition Treaty between Great Britain and the United States, and suggesting the expediency of taking steps for the negotiation of a more comprehensive treaty; and in reply I am directed by his Lordship to state to you, for the information of the Earl of Carnarvon, that negotiations for the conclusion of a new treaty with the United States were opened after the passing of the Extradition Act of 1870, and were carried on until May 1874, when they were suspended in consequence of the Government of the United States objecting to an article in the English Draft which provided, in accordance with section 3 of the Act of 1870, that "no accused or convicted person shall be surrendered, if the offence in respect of which his surrender is demanded shall be deemed by the party upon whom the demand is made to be of a political character, or if he prove to the satisfaction of the magistrate, justice, judge or court before which he is brought, or of the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or to punish him for an offence of a political character."

The Government of the United States main-

tained that the Secretary of State alone should decide whether an offence with which a fugitive criminal is charged is of a political character.

On the other hand, the Secretary of State for Home Affairs, to whom this question was referred, reported that it was not possible to agree to the proposal of the United States Government, as any stipulation in accordance with their views would be at variance with section 3 to the act above recited.

Under these circumstances Lord Derby considered that it would be useless to continue the negotiations, which were accordingly suspended until quite recently, when the question was revived in a discussion which took place between Her Majesty's Minister at Washington and the Secretary of State of the United States, relative to the trial of a fugitive criminal named Lawrence, who was surrendered to the United States in April last on a charge of forgery.

As, however, Mr. Fish continues to hold the same views on the point at issue as he held in 1874, and to maintain that the British Government must take the whole responsibility in deciding whether the offence with which a fugitive criminal is charged is of a political character, Lord Derby apprehends that there is at present little hope of concluding a new Extradition Treaty with the United States.

Should, however, a favourable opportunity occur, His Lordship will not fail to press upon the Government of the United States the expediency of concluding a more comprehensive treaty than the existing one, an arrangement which would be as much to the advantage of the United States as to Great Britain and the Dominion of Canada.

I have, &c.,

(Signed),

T. V. LISTER.

The Under Secretary of State,
Colonial Office.

"Sic utere tuo ut alienum non lædas." This maxim was once discarded unceremoniously by Mr. Justice Erle. "The maxim," he said, "is mere verbiage. A party may damage property where the law permits, and may not where the law prohibits, so that the maxim can never be applied till the law is ascertained, and when it has been, the maxim is superfluous."—*Bonomi v. Backhouse*, 36 L. J. Q. B., 388.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

MONCK ELECTION PETITION (DOMINION).

GRANT V. MCCALLUM.

37 *Vict. cap 9, ss. 23, 45, 80.*—*Effect of neglect of duty by returning officer.—Marking ballot paper.*

The neglect or irregularities of a returning officer in his duties under the act will not invalidate an election, unless they have or might have caused some substantial injustice in the way of affecting the election. *Held* therefore, that the neglect of a returning officer to initial the ballot papers, and to provide pen and ink instead of a pencil to mark them, would not void the election.

The following irregularities in the mode of marking ballot papers, *held* to be fatal :—

1. Making a stroke instead of a cross.
2. Any mark which contains in itself a means of identifying the voter, such as his initials or some mark known as being one used by him.
3. Crosses made at left of name, or not to the right of the name.
4. Two single strokes not crossing.

The following irregularities *held* not to be fatal :—

1. An irregular mark in the nature of a cross so long as it does not lose the form of a cross.
2. A cross not in the proper compartment of the ballot paper, but still to the right of the candidate's name.
3. A cross with a line before it.
4. A cross rightly placed with two additional crosses, one across the other candidate's name, and the other to the left.
5. A cross in the right place on the back of the ballot paper.
6. A double cross or two crosses.
7. Ballot paper inadvertently torn.
8. Inadvertent mark addition to the cross.
9. Cross made with pen and ink instead of a pencil.

[January 8-10, 1876—BLAKE V.C.]

Mr. McCallum was declared elected by a majority of four votes over his opponent, Mr. Edgar. A petition having been filed, claiming the seat for the latter, a scrutiny of the ballots was obtained, which was had before Vice-Chancellor Blake.

Hodgins, Q.C., and Edgar for the petitioner.

McCarthy, Q.C., and Osler for the respondent.

BLAKE, V.C.—The parties did not desire that I should state a case for the opinion of the full Court in respect of the matters raised, which seemed to me to involve questions that it would have been well to have had settled by

the Court on a rehearing. I proceed, therefore, at once to dispose of the petition, so as to enable the party dissatisfied, if he pleases, to appeal the case during the coming month.

The considerations applicable to two of the questions raised appear to me to differ from those which should regulate the disposition of the other points discussed. I refer to those irregularities which arose from the act of the deputy returning officer—the one, the use by the electors, in some instances, of pen and ink, supplied by this officer in place of a pencil; the other, the use of ballot-papers in the election not marked by the deputy returning officer, as contemplated by the act.

The duty cast upon this officer is clearly defined by the statute. The 2nd clause in the "Directions for the guidance of electors in voting," in schedule 1, is as follows: "The voter will go into one of the compartments, and with a pencil there provided place a cross opposite the name or names of the candidate, or candidates, for whom he votes, thus x;" and sub-section 4 of section 28 enacts that the returning officer is to furnish each deputy returning officer "with the necessary materials for voters to mark their ballot-papers." The latter portion of section 43 deals with the other point: Each elector "shall receive from the deputy returning officer a ballot-paper, on which such deputy returning officer shall have previously put his initials." It is to be regretted that these officers, by their culpable neglect in omitting to observe these plain and simple rules, should cause the difficulties which have arisen in the present case. Having undertaken these duties, they should have fulfilled them with intelligence, care and honesty, and they may be deservedly censured for involving the candidates in the difficulties and expense connected with the present scrutiny. It does not better their position that possibly their irregularities and mistakes may be covered by a healing clause in the act. Section 80 makes the following provision: "No election shall be declared invalid by reason of a non-compliance with the rules contained in this act as to the taking of the poll. . . or of any mistake in the use of the forms contained in the schedules to this act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this act, and that such non-compliance or mistake did not affect the result of the election." The principles laid down by the act seem to be secrecy in voting,

Elec. Cases.]

MONCK ELECTION PETITION (DOMINION.)

[Ontario.

and the removal of difficulties in the way of an elector exercising his franchise.

There seems to be no doubt that the election in question was conducted in accordance with these principles. It cannot be said that the irregularities complained of affected or bore upon the result of the election, nor were they calculated to do so. It was not even argued that any injury of the kind has here arisen—that any other than the provided ballot-papers had been used, or that the vote of any one not entitled to vote had been received. The neglect of the officer should not be visited on the elector or candidate, unless it is apparent that it has, or might have caused some substantial injustice. Of the 132 votes cast in Pelham Division No. 1, it is said 130 are open to the objection that the ballot-papers were not initialed by the deputy returning officer. I do not think I should lightly disfranchise so large a body of the electors, nor should I lightly say the irregularity is of such a nature as to disfranchise, and this disfranchisement being so general, the whole matter must be set at large and a new election ordered.

I am of opinion that, under this clause, irregularities of the nature here relied upon in order to invalidate the election must be substantial and not mere informalities—that the informality must be of such a nature as that it may reasonably be said to have a tendency to produce a substantial effect upon the election. I do not think the irregularities here complained of in any manner interfered with the election being a real one, nor did they in any manner affect the result, and therefore they cannot be raised as grounds for avoiding it. This view is corroborated by the finding in the *Hackney Case*, 31 L. T. N. S. 72. There Mr. Justice Grove says: "An election is not to be upset for an informality or for a triviality. It is not to be upset because the clock at one of the polling-booths was five minutes too late, or because some of the voting papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated to affect the result of the election."

It must also be borne in mind that if the Court lightly interferes with elections on account of errors of the officers employed in their conduct, a very large power may thus be placed in the hands of these men. That which arises from carelessness to-day may be from a corrupt motive to-morrow, and thus the officer is enabled, by some trivial act or omission, to serve some

sinister purpose, and have an election avoided, and at the same time to run but little chance of the fraudulent intent being proved against him. I therefore disallow the objection taken to votes given by means of ballot-papers marked with the pen and ink provided in the polling-booth, and to those given on the ballot-papers provided by the returning officer but not initialed by him.

There were three other points argued before me: 1. What mark sufficiently expresses the intention of the elector as to his voting? 2. Where must this mark be placed? 3. What additional mark warrants the rejection of the ballot-paper? The following portions of section 45 and of schedule I. deal with the first two of these questions: "The elector . . . shall . . . mark his ballot-paper, making a cross on the right-hand side, opposite the name of the candidate . . . for whom he intends to vote." "The voter will . . . place a cross opposite the name . . . of the candidate . . . for whom he votes, thus x." It is also to be noted that in the form given the cross is not exactly opposite the word "Roe," or the words "Richard Roe," but appears as follows:—

II.	ROE. RICHARD ROE, of — Town in —	. x
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I think that every reasonable latitude that can be given to an elector as to the form or position of his mark, without a direct invasion of the statute, should be given to him. The act, however, requires that this mark should be a cross, and it also requires that this cross should be on the right-hand side, opposite the name of the candidate. I cannot say, therefore, that, so far as the mark is concerned, the elector has complied with the act when, in its place, he puts a single line. I must rather conclude that the elector, for some purpose, desired to go merely through the form of voting, and expressed this intention by placing such a mark there as evidenced his design of not complying with the requirements necessary to allow his ballot to be counted for either of the candidates. The single stroke does not show a concluded intention of voting, for only a portion of that which is the defined figure is thus made. The voter is told that if he puts a cross in a particular place, which is well defined on his ballot-paper, his vote will be accepted; if he does not choose to do that, he loses his vote. It may be that at first this rule will work hardly; but soon a matter so easily comprehended will be

perfectly known throughout the country. In the meantime, the price paid for obtaining secrecy in voting will be the virtual disfranchisement of a small proportion of voters who have not learned how to vote under the present system.

Until the mark loses entirely the figure of a cross, I think it should be allowed. It may be imperfectly made; there may be additions to it from nervousness, or awkwardness, or by way of embellishment. There may be several lines crossing another line or other lines. The one line may lie upon the other at any angle. The one line may cross the other but a short distance, yet so long as it is possible to say the figure can be taken as that of a cross, it would be the duty of the Court to say the intention of the elector is sufficiently defined to allow his ballot to stand. As with the form of the cross, so with its position. I do not think it necessary that it should be exactly opposite either the word "Roe," or "Richard Roe." It may be above or below a line produced from the name parallel with the end of the ballot-paper. It need not be in the compartment in front of the name, but the moment it ceases to be on the right-hand side, then it is no longer in the place which indicates an intention of voting, and therefore must be rejected. If it be correct that the form of the mark, such as a line or a circle, vitiates the ballot, I do not think it unreasonable to say that the position of the mark may have the same effect. A man who pretends to vote puts a stroke and nothing more, and knows his ballot paper will be rejected; a man who does not want in reality to vote may just as well say, "I will place my mark or cross to the left of the name, and thus, though apparently voting, vitiate my ballot-paper." I think it is safer in a case where the wording of the act is so plain as here, to require a reasonable compliance with that which it lays down as being the requirements of a ballot-paper which is to be accepted, rather than to enter into a minute examination of the position of each cross, and endeavour to assign some reason in each case for that which virtually is an invasion of the plain language of the act.

The third point raised depends on the true construction of section 55 and schedule 1:—

The returning officer shall reject all ballot papers "upon which there is any writing or mark by which the voter could be identified." If the voter places any mark on the ballot paper or envelope by which he can afterwards be identified, his vote will be void and will not

be counted." The marks found on the ballot papers are—(a.) Additions or embellishments to the figure intended to represent the cross, and by which such figure might be distinguished from other crosses. (b.) Marks made inadvertently near the cross, and which have arisen evidently from nervousness or awkwardness. (c.) Distinct lines or figures made in various places on the ballot paper.

The act does not say any mark, or any mark deliberately made, but a writing or mark by which the voter could be identified. I think the mark must contain in itself a means of identification of the voter in order to vitiate the ballot. There must be something in the mark itself, such as the initials, or some mark known as being one the voter is in the habit of using. If there be not this restriction, then it will naturally follow that every peculiarity about every cross should be scanned in order to see whether some of the additions were not put there designedly so as to mark distinctively that particular ballot paper. Any mark in addition to the cross might thus avoid the vote, and, on the same principle, any alteration in the position of the cross from a rigid observance of what is set forth in the act should be taken as a means of denoting the ballot as one marked so as to require its rejection. I think if the Legislature intended this result we should have found different language used from that which we have in this enactment.

I proceed on the above rules to scrutinise the votes objected to on both sides. The petitioner had 1,329 votes and the respondent 1,333, leaving a majority of four votes for the respondent. In Canboro No. 1, there were four ballots for the petitioner rejected, which rejection is objected to. This affords a fair example of the necessity for observing with exactness the rules prescribed by the act. The deputy returning officer here employed pen and ink. The crosses in these four cases were distinctly made opposite the name Edgar, and in the proper position on the ballot paper. The voter folded the paper down at once, and accurately, which made an impression opposite the name McCallum. We have by this means a cross opposite the name Edgar, and another cross identical in form opposite the name McCallum. On a close inspection it is apparent that the upper cross is the original one, and that the lower, or McCallum one, is caused merely by the paper being brought into contact with the mark the ink of which was not dry. These four votes should therefore be allowed to Edgar.

Elec. Cases.]

MONROE ELECTION PETITION (DOMINION.)

[Ontario.]

Edgar. Dunnville, No. 1. McCallum.

- There were four votes rejected
- 4 for Edgar. One was improperly rejected, the mark being a cross to the right hand and opposite the name. Two were crosses to the left of the name, and the fourth was a single stroke. These three were properly rejected.

Moulton and Sherbrooke, No. 1.

There was a miscount. The numbers returned were thirteen for Edgar and one hundred and fifteen for McCallum, whereas it should have been twelve for Edgar and one hundred and sixteen for McCallum.

Wainfleet, No. 1.

There were four rejected for McCallum, one of which I allow, being a well defined cross with a line running through its centre.

Caistor, No. 1.

There was a cross to the left of the name properly rejected for McCallum.

Wainfleet, No. 2.

There were two rejected for McCallum; one properly, as being a cross to the left of the name; the other improperly, there being a well defined cross opposite "McCallum," and a single stroke opposite "Edgar."

Dunnville, No. 1.

There is one properly rejected for Edgar, there being simply a stroke with a pen through the figure "1" of the year "1875," which appears on the ballot paper to the left of the name.

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So that up to this point there should be added to the number of votes polled for Edgar, as being improperly rejected, five, and there should be deducted for the miscount one; leaving the total addition to be made four, and thus giving the number of votes polled for him thirteen hundred and thirty-three; and there should be added to the number of votes polled for McCallum, as being improperly rejected, two, and for the miscount one; thus making the number of votes polled for him thirteen hundred and thirty-six. Of the votes allowed by the re-

turning officer, I find the following should be disallowed:—

Edgar. Gainsboro', No. 3. McCallum.

- One single stroke disallowed; 1
two single strokes, and two crosses
4 not to the right hand of the name,
disallowed.

Dunnville, No. 2.

- One single stroke, and one cross
not to the right hand of the name, 2
disallowed.

Caistor, No. 3.

- One single stroke, disallowed; 1
one cross with a line before it, al-
lowed.

Moulton and Sherbrooke, No. 2.

- One with a single stroke, disal- 1
lowed; one with three crosses—
the one in the proper compart-
ment, the other across the name
McCallum, and the third in the
left compartment—allowed. These
crosses were so placed, I think,
because the voter was uncertain
where the mark should appear. As
there is a cross rightly placed, I
do not think the vote should be
rejected because of the additional
crosses. One single stroke, disal-
lowed.

Wainfleet, No. 3.

- One single stroke, disallowed; 1
one with a second cross, allowed,
it not appearing that the mark
identifies the voter.

Wainfleet, No. 2.

- Two single strokes and one cross
not to the right hand of the name, 1
disallowed; one single stroke, dis-
allowed.

Pelham, No. 3.

- One single stroke, disallowed. 1

Moulton and Sherbrooke, No. 3.

- One single stroke, and two with 3
crosses not to the right hand of
the name, disallowed; a fourth,
with the cross to the right hand
of the name in small letters, al-
lowed; two single strokes, disal-
lowed.

Moulton and Sherbrooke, No. 1.

A cross on the back of a ballot
paper for McCallum, allowed.

Elec. Cases.] MONCK ELECTION—GLENGARRY ELECTION PETITION (DOMINION) [Ontario.

Edgar. Dunnville, No. 1. McCallum.

- 1 A single stroke, disallowed ; a double cross, allowed.

Gainsboro', No. 2.

- One cross not to the right hand of name, disallowed ; a ballot paper inadvertently torn, allowed. 1
- 2 Two with a cross not to the right hand of name, disallowed ; one ballot paper inadvertently torn, allowed ; one with a cross properly placed, but with an obliterated mark in the McCallum column, allowed.

Gainsboro', No. 1.

- One cross not to the right hand of the name, disallowed ; one with a mark on the cross, allowed ; 1
- 2 two with single strokes, disallowed ; two with a cross to the left hand of the name, disallowed ; one ballot paper torn, allowed.

Dunnville, No. 2.

Two crosses opposite the name, allowed.

Pelham, No. 1.

- Two crosses opposite name, allowed ; an erased mark opposite Edgar's name, in addition to a cross opposite McCallum's name, allowed ; one single stroke, disallowed. 1

Wainfleet, No. 1.

Two with a cross not to the right hand of the name, and an additional mark, disallowed. 2

Gainsboro', No. 4.

One ballot paper inadvertently torn, allowed ; one with an inadvertent mark under the cross, allowed.

Caistor, No. 1.

An inadvertent pencil mark, allowed ; a ballot paper inadvertently torn, allowed.

Caistor, No. 3.

Four ballot papers inadvertently torn, allowed.

Pelham, No. 2.

An inadvertent additional mark, allowed.

Edgar. Canboro, No. 1. McCallum.

- A ballot paper inadvertently torn, allowed ; an inadvertent additional pencil mark, allowed ; four marked with pen in place of pencil, allowed ; two with single lines in place of crosses, disallowed ; one ink cross blotted, allowed.

Canboro, No. 2.

- One cross not to right hand of name, disallowed ; one, not a cross—a circle with two lines underneath—disallowed ; one with a cross in the proper place and a second cross erased, allowed. 1

Dunnville, No. 1.

One inadvertent additional pencil mark, allowed ; four ballot papers inadvertently torn, allowed.

Caistor, No. 3.

- One cross to the right of the name in small letters, allowed. —
- 19 18

This disposes of all the objections made ; and deducting the votes disallowed Edgar (19) from the votes allowed (1,333), would leave the number of votes polled for him 1,314 ; and deducting in like manner the votes disallowed McCallum (18) from the votes allowed him (1,336) would leave the number of votes polled for him 1,318. This would give him, as the result of the investigation, a majority of 4 votes, and he is therefore entitled to retain the seat. I have therefore to declare that Mr. McCallum has been duly elected and returned, and I shall certify that to the Speaker.

Election sustained.

GLENGARRY ELECTION PETITION (DOMINION).

JOHN RONALD McDONALD, *Petitioner*, v. ARCHIBALD McNAB, *Respondent*.

Application to postpone trial—28 Vict., cap. 10, sec. 2.

The trial of an election petition should not be postponed without the applicant shewing very cogent and almost unanswerable grounds.

In this case the reason given was that the Lieutenant-Governor of Ontario was a necessary and material witness, and that he could not properly leave Toronto during the sittings of the House of Assembly. Held, not a sufficient reason.

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GLENGARRY ELECTION PETITION (DOMINION.)

[Ontario.]

Held also, that the application to postpone a trial allowed by 38 Vict., cap. 10, sec. 2, is confined to that part of the enactment relating to the proceeding of the trial *de die in diem*, after it has commenced.

[January 19th, 1876—WILSON J.]

Osler moved absolute a summons to postpone the trial of this case on the ground that the Lieutenant-Governor of Ontario was a necessary and material witness, and that it was impossible for him to attend at Alexandria, where the case was to be tried on the 25th January, whilst the Ontario Legislature was in session. Several affidavits were put in showing the injury which the public interests would suffer if his Honour were to leave the seat of Government at this juncture.

Sir J. A. Macdonald, Q.C., shewed cause. It is not competent for a single judge to change a day which has been fixed for the trial by the full Court. The petition was filed in the beginning of August last, and the words of the statute, 38 Vict., cap. 10, sec. 2, rendered it absolutely necessary that the trial should be commenced within six months from that date. This statute enacts that "the trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with *de die in diem*, until the trial is over, unless on application, supported by affidavit, it be shewn that the requirements of justice render it necessary that a postponement of the case should take place." It is plain that the exception introduced by the word "unless" refers only to the proceeding with the trial *de die in diem*, and not to the provision made for the commencement of the trial within six months. The affidavits do not show a case on the merits. They merely state that inconvenience will result from the absence of the Lieutenant-Governor, but they do not show how or why. It is of the highest public importance that election trials should be disposed of at the earliest possible moment. If the trial were postponed it would have the effect of giving the respondent a seat for the next session, for his presence would certainly be required at the trial, and therefore, under the act, it could not take place during the session.

Osler, *contra*. There could be no question about a single judge having power to postpone the trial, for the Controverted Elections Act of 1874, 37 Vict., cap. 10, sec. 8, declares that the "Court" shall mean certain specified courts, "or any of the judges thereof." The object of the Act 38 Vict., c. 10, is to prevent unreasonable delay in the trial of election petitions, with

which object six months from the presentation of the petition has been fixed as the ordinary limit for the commencement of the trial. But this rule is not absolute and unqualified. It is subject to the exception stated in the last clause of that portion of sec. 2 which has been cited. The words "unless on application," &c., must be taken to apply to the limitation of six months, as well as to the proceeding *de die in diem*. According to the construction contended for by the petitioner's counsel, it would be necessary for judge, counsel and witnesses to go to Alexandria, in order to commence the trial formally, before a postponement could be granted, however reasonable and necessary it might be. The affidavits read shewed good ground for the postponement asked. The relations existing between the Queen and her Cabinet are not of so intimate a nature as those between the Lieut.-Governor and his ministers. He understood that in England the sign manual was generally affixed to acts by a commission, while no such provision existed in this country.

WILSON, J. The language of the Act 38 Vict., c. 10, sec. 2, is imperative "that the trial shall be commenced within six months from the time when such petition has been presented," and I cannot, before the trial has commenced, postpone the trial until a day which will be after the six months have expired. The words "unless on application, supported by affidavit, it be shown that the requirements of justice render it necessary that a postponement of the case should take place," are confined apparently to that part of the enactment relating to the proceeding of the trial after it has begun *de die in diem*.

If the construction of the section, however, be even doubtful in that respect, I should not postpone the trial to a day beyond the six months, because that might render abortive the whole of these proceedings, and at any rate it would cast on the petitioner the necessity of maintaining the validity of the delay which had been granted adversely to his desire and interest, and solely at the instance and to meet the necessity or convenience of the respondent. That is quite sufficient to dispose of the application.

If I had possessed the power beyond all question to extend the time of trial as asked for beyond the period of six months before first entering upon the trial, it is very doubtful if I should have done it in this case. The earliest time which could have been fixed for it would be about the beginning of July next. It is

Elec. Case.] GLENGARRY ELECTION—TURNER V. NEILL—CITY BANK V. MACKAY. [C. L. Ch.

forbidden to try the petition "during any session of Parliament," "whenever it appears to the Court or judge that the respondent's presence at the trial is necessary;" and it is admitted by all parties that the respondent's presence at the trial will be necessary. That would delay the trial till probably about the middle of May. It is also forbidden to commence or proceed with the trial "during any term of the Court of which the judge trying it is a member, and at which he, by the law, is bound to sit;" and as the Easter term of the court of which I am a member will begin on the fifteenth of that month, and will continue until the third of June, and as for three weeks after that day each judge of the court will be engaged in preparing judgments in the cases which have been argued and remain *en delibere*, there can be no time fixed for the trial of the petition at Alexandria, in the county of Glengarry, sooner than about the end of June or the beginning of July. Now the great delay which has already taken place in the trial of the petition, and which is attributable solely to the respondent, and the still greater delay which must follow if the trial be not now proceeded with at the time which has been specially appointed for it; and considering the nature of the question involved—the right to a seat in the House of Commons—are reasons which make it necessary and obligatory to go on with the trial unless there are very cogent and almost unanswerable grounds for granting the delay. Such grounds I do not think have been established in this case.

The reason for the postponement is that his Honour the Lieutenant-Governor of this province, who is a material and necessary witness in this cause, is unable during the session of the Legislative Assembly to leave the seat of Government, where it is said his presence is daily required. I have no doubt his Honour's presence at the seat of Government is of great importance, especially while the Legislative Assembly is in session; but considering the great delay which must take place if the trial be postponed, the subject which is in dispute in that trial, the short time which his Honour will be absent from the seat of Government while he is attending as a witness, and the almost paramount importance of all matters being laid aside by those who are called upon by courts of the land to aid in the administration of justice as witnesses or otherwise, which would stand in the way of their rendering obedience to the summons, I think it is better I should, fully

weighing the advantages and disadvantages which have been alluded to, leave the cause for trial at the time appointed, and not longer delay it; and I trust the injury which it is said the public service may sustain by the temporary absence of his Honour the Lieutenant-Governor for a few days, even while the House is in session, may not be so great as has been conjectured.

I shall therefore discharge the application, and direct that the costs of it shall be costs in the cause.

Summons discharged.

COMMON LAW CHAMBERS.

TURNER V. NEILL.

Examination of defendant.—Striking out sales plea.

[January 25, 1876—MR. DALTON.]

In this case a summons was obtained to strike out the defendant's pleas, as proved to be false by his examination under the Administration of Justice Act.

MR. DALTON declined to strike out the plea, although he thought there could be little doubt that it was false. It involved a point which required evidence for its establishment in addition to defendant's admissions, and no matter how clear the case might be, he had not power to strike out the plea unless the defendant, in a proceeding of the Court, admitted it to be false. Costs to be costs in the cause.

CITY BANK V. MACKAY.

Service on principals.—Notice to plead.

It is not irregular, under C. L. P. Act, sec. 61, to serve, in Toronto, a country attorney; and ten days' notice is not necessary under such circumstances.

[Feb. 19, 1876—MR. DALTON.]

The defendant's attorney, who resided in Dundas, had been served with the declaration when he happened to be in Toronto. A summons was obtained to set aside the service, on the ground that the attorney's agent, and not the attorney himself, should have been served under C. L. P. Act, sec. 61, and that, supposing the service good in this particular, ten days' notice to plead should have been given instead of eight, under 34 Vict., c. 12, s. 12.

Monkman shewed cause. The C. L. P. Act, s. 84, provides that declarations and other pleadings may be served in any county. The

service was therefore as good on the principal in York as it would have been in his own county of Wentworth. As to the notice to plead, ten days is only required when the agent is served.

Davidson contra.

Mr. DALTON thought that the service was good under the section of the C. L. P. Act cited in its support, and that the eight days' notice was sufficient. The summons was accordingly discharged with costs.

CHANCERY CHAMBERS.

McAVILLA v. McAVILLA.

Motion to commit for disobedience of order—Con. Gen. Order, 293.

A motion to commit defendant, or to take the bill *pro confesso* for non-attendance of defendant for examination, pursuant to a special order, was refused where the order had not been previously served.

[January 15, 1876—*REPERER.*]

By an order of the Court, dated the 29th day of September, 1875, it was ordered that the defendant should personally appear within one month before the Master at Belleville, for the purpose of being 'cross-examined' on his answer in this cause by the plaintiff, at such time and place as the Master should appoint, eight days notice thereof to be given to the defendant's solicitors; and that the said defendant, upon then and there being paid his proper conduct money, should submit to such cross-examination.

The plaintiff obtained an appointment from the Master on the 18th Oct., 1875, appointing the 29th Oct., at 3 p.m., for the examination to take place. This appointment was served on the defendant's solicitor on the 18th Oct., 1875. The defendant did not attend at the time and place appointed, although he seemed to have known of the appointment, and called at the office of the plaintiff's solicitor shortly before the hour appointed for the examination to take place.

The plaintiff's solicitor then obtained said appointment on the 1st Nov., appointing the 10th for the examination, which appointment was served on the defendant's solicitor on the 1st Nov. On the return of this appointment his solicitor appeared, but the defendant himself did not attend. On the 16th Nov. the defendant's solicitor waited upon the plaintiff's solicitors, and informed them that he had received a telegram from the defendant, agreeing

to attend and be examined on the 17th Nov., and requesting that an appointment might be obtained for that day. It so happened, however, that the Master was unable to give any appointment for that day, and therefore the defendant's solicitors concurred in the 22nd Nov. being appointed for the examination.

On the morning of the 17th Nov. the defendant came to Belleville and offered to submit to examination; but he was told that the examination could not be taken that day, and the plaintiff's solicitor then went with the defendant to the Master's office, when the Master showed him the appointment made in his book for taking his examination on the 22nd, and the plaintiff's solicitor, moreover, notified him verbally that if he failed to attend he would move to take his answer off the files and to note the bill *pro confesso* against him, or move to commit him for contempt.

Notwithstanding this, defendant did not attend at the appointed time, but went off to the shanties, some fifty miles north of Peterboro', where it would be very difficult to reach him, and from whence he was not likely to return until the spring.

F. Arnoldi for the plaintiff, now applied to commit the defendant for contempt, in disobeying the order of 28th Sept., 1875, or to take the answer of the defendant off the files, and to take the bill *pro confesso* against him, or for such other order as the Court might think fit.

W. G. Cassels for defendant.

MR. HOLMSTED—Whatever may have been the intention of the Court or the parties, the order of the 29th of September does not in terms dispense with the service of that order upon the defendant, endorsed with the usual notice required by Order 293. Neither does the order itself conform to the provisions of that order. And the order, in point of fact, was not served upon the defendant, or even upon his solicitor, at any time before the alleged default was made. This, I think, is fatal to the success of this application. (See *Wagner v. Mason*, 6 Prac. R. 187, and the cases of *Rider v. Kidder*, 12 Ves. 202, and *De Manneville v. De Manneville*, ib. 203, *Daniells*, Pr. 5th Ed., p. 903-5, and *Adkins v. Bliss*, 2 De. G. & J. 286).

It is not possible for me to, nor do I think the defendant's solicitors could dispense with the provisions of General Order 293; and the omission to serve the order, therefore, is a matter which I do not think they could be deemed to have waived. The object of Order 293 is to

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prevent surprise, and to bring home to the party called on to obey the order of the Court the penalty he will incur by his disobedience; the verbal intimation the defendant received from the plaintiff's solicitor, I do not think can suffice.

The motion to commit, therefore, must be refused, and I think the application to take the bill *pro confesso* must also fail, because it is only in cases where the Court finds that a defendant is in contempt, that that remedy can properly be granted to the plaintiff. Although I am of opinion that the defendant has not brought upon himself the penalties of contempt, I nevertheless think he has acted very unreasonably, and I refuse to give him any costs of this application.

I think the proper order to make under the circumstances would be to extend the time for taking the cross-examination, and provide, by the or I now make, that service of it upon the defendant's solicitor shall be sufficient.

STREET v. HALLETT.

Vendor and Purchaser—Incumbrance created pendente lite—Consent decree.

A defendant who claimed to be sole owner of the land in question in the suit, had *pendente lite* sold to one H. the right to cut timber on the land and the purchaser at the sale under decree refused to carry out his purchase until this right was released, which H. refused to do.

Held, that the decree having been made by consent, H. was not bound by it; and that, therefore, the existence of H.'s incumbrance was a valid objection to the title, and had not been waived by the purchaser's merely taking a consent to obtain, without having actually obtained a vesting order, nor by his having under the circumstances had the conveyance settled by the Master, without making H. a party to it.

The party having the conduct of the sale represents, for the purposes of the sale so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove, or procure to be removed, any objection which may properly be made to the title.

[January, 1876—*Ex parte*.]

This was an application by the plaintiff to compel the purchaser, Mr. J. D. Woodruff, to pay that part of his purchase money payable at the time of the application, into court, and to execute a mortgage to secure the balance, in accordance with the conditions of sale. The motion was resisted on the ground that, pending the suit, the defendant, Luke Hallett, who claimed to be sole owner of the land, had sold to one Harris a right to cut timber on the land,

which right Harris refused to release, and it was contended that Harris was not bound by the decree, because it was made by consent and because he was no party to the suit.

The sale took place on the 17th May, 1875, when it was expressly stated that Harris had no claim, notwithstanding his assertion to the contrary. The purchase money was payable as follows: 20 per cent. on the day of sale, 80 per cent. in one month thereafter, and the balance to be secured by mortgage, payable in three annual instalments, with interest at 6 per cent. The deposit at the sale was paid to the vendor's solicitors, but no further sum was paid. By mutual agreement between the parties it was subsequently agreed that the purchase money, instead of being paid into court or secured by mortgage, should be paid directly to the parties entitled. According to the affidavit of the purchaser's solicitor, it appeared that he searched the Registry office and found Harris's agreement on record, on 29th July, 1875. On the 1st of August he obtained from the solicitors of the plaintiff and defendants a consent to his obtaining a vesting order. Subsequently, on the advice of his solicitor, he decided not to act upon it and required a conveyance, and a conveyance was accordingly carried into the Master's office by the purchaser, and settled by the Master on the 18th September, 1875. The purchaser's solicitor subsequently prepared a release for Harris to execute, and sent it to him for execution; but Harris refused to execute it, and the purchaser's solicitor, on the 21st October, 1875, notified the vendor's solicitor of the fact. Since that time nothing was done to procure the release.

Cassels for the plaintiff.

Esart for the purchaser.

MR. HOLMESTED.—I think the objection made by the purchaser to the title is well founded.

It was contended that the purchaser had waived the right to take this objection by reason of the great delay, and also by taking a consent to his obtaining a vesting order, and also by having the conveyance settled by the Master without having Harris made a party to it. I am of opinion that none of these circumstances can deprive the purchaser of his right to insist on the removal of the objection.

If he had actually accepted a vesting order or conveyance, the case of *Kincaid v. Kincaid*, 6 Prac. R. 98, and *Bull v. Harper*, ib. 86, would have been applicable. The mere fact that the parties to the suit consented that he should get a vesting order is a very different thing. With

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regard to the delay, it appears by the affidavit that it was expressly stated at the sale that Harris had no claim, notwithstanding his assertion to the contrary. The purchaser's solicitor, moreover, states that he was given to understand that Harris would execute a release when called upon to do so, and from this fact one can understand that he was induced not to make this claim of Harris a formal objection to the title at an earlier date; as soon, however, as he had definitely ascertained that Harris would not execute a release in October last, he notified the vendor's solicitor, and I do not find that he has done anything since which can fairly be said to be a waiver of the objection.

In the affidavit of the plaintiff's solicitor, it is stated that any claim Harris may have he obtained from the defendant Hallett, and he believes that the plaintiff is not liable to pay Harris for the release, but that the defendants, other than Street, are the parties who are bound to get the claim released. It is this consideration which has probably induced the plaintiff's solicitor to come to the conclusion that as between the plaintiff and the purchaser he was not bound to procure the removal of this objection to the title, but in this respect the plaintiff's solicitor has, I think, mistaken the practice. It is quite out of the question to suppose that a purchaser at a Chancery sale is to deal individually with each party to the suit, in order to procure the removal of objections to the title. On the contrary, the practice is perfectly well settled that the party having the conduct of the sale represents for the purpose of the sale, so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove or procure to be removed any objections which may properly be made to the title; and if, in order to do so, it is necessary that any part of the purchase money should be applied, it may become a question between the parties to the suit as to whose shares it should ultimately be paid out of; that is a matter, however, with which the purchaser has nothing to do, and must be adjusted by the parties themselves, or, if need be, by the Court, on a proper application for that purpose.

As the parties in this case have agreed that the balance of purchase money shall be paid direct to the parties entitled, and not into court as provided by the conditions of sale, an agreement which they were competent to make, being all *sui juris*, I do not think the purchaser is in default, but is perfectly justified in withholding payment until the objection is removed; and if it cannot be removed, then I

think the purchaser will be entitled to move to be discharged from his purchase, and to have his deposit refunded, or for the allowance of an abatement in his purchase money.

The present application is premature, and must be refused with costs.

NOTES OF CASES
IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

ONTARIO SALT COMPANY V. LARKIN.

Carriage of goods by water—Mistake by master in delivery—Liability of owner—Vessel chartered for the trip.

Appeal from the judgment discharging a rule nisi to enter a nonsuit: see 35 U.C.Q.B. 229.

One H. had chartered a schooner from Goderich to Chicago, and not being able to fill her, told the plaintiffs' agent that they might send 1,000 barrels of salt by her, paying the same rate as he did. This salt was accordingly shipped at Goderich, and this agent signed a bill of lading, by which it was to be delivered to P. & Co., Chicago, care of the Chicago, Burlington & Quincy R. W. Co., Chicago. It had also P. & Co.'s brand on the barrels. There was about 2,400 barrels of salt on board besides, consigned to H. On the voyage about 300 barrels of the deck load, not being part of the plaintiffs' 1,000 barrels, were washed or thrown overboard by stress of weather; and the captain, on arriving, told the freight agent of the railway that it was the plaintiffs' salt which had been thus lost. This freight agent employed one Haines, who was also the shipping clerk for the agents of H., to receive the salt at Chicago, and load it on the cars there; and H. being there, directed about 300 barrels of the plaintiffs' salt to be put with his own, thus making up his own quantity, while the plaintiffs only got 610 barrels.

Held, in the Court of Queen's Bench: 1. That the owner of the vessel, and not H., was her owner for the trip and the contractor with the plaintiffs. 2. That if the master delivered the salt on the dock as H.'s salt when it was in fact the plaintiffs', the defendant would be answerable; that there was some evidence of his hav-

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NOTES OF CASES.

[Ontario.]

ing done so ; and that a verdict for the plaintiffs, therefore, should not be disturbed.

On appeal this judgment was affirmed.

STRONG, J.—It is the duty of the captain not thereby to deliver the goods on the wharf, but as far as possible to separate the different consignments, so as to render them accessible to their respective owners.

S. Richards, Q.C., for plaintiffs.

Robinson, Q.C. and J. A. Miller, for defendant.

JONES V. COWDEN ET AL.

20 *Fict., c. 24, sec. 57—Retrospective, operation of.*

Appeal from the judgment of the Court of Queen's Bench, reported 34 U.C.Q.B. 345, and making absolute a rule nisi to enter a verdict for the plaintiff.

The judgment of the Court of Queen's Bench. 34 U.C.Q.B. 345, affirmed on appeal.

Bethune and J. W. Kerr for plaintiff.

S. Richards, Q.C., and Benson for defendants.

QUEEN'S BENCH.

EASTER TERM, 1875.

SOROGGIE ET AL. V. TOWN OF GUELPH.

Town corporation—Drains—Injury by overflow—Gratings in side-walk.

The plaintiffs sued defendants for negligently suffering the drains on their streets to become choked, whereby the waters and drainage overflowed therefrom into the plaintiffs' cellar, and damaged their goods there.

The jury found, upon the evidence set out in the case, and which was held by the Court to warrant their finding, that the defendants had reason to believe the drains might be choked, and remained negligently ignorant of their condition ; and a verdict for the plaintiffs was therefore sustained.

There were gratings and trap-doors in the side-walk opening into the cellars of one P., whose premises adjoined the plaintiffs', which the jury found had been placed there many years before without defendants' permission. *Semble*, that if the water had got into the plaintiffs' premises through the plaintiffs' own gratings, defendants would not have been liable ; but that as between them and the plaintiffs they were responsible ; as they would be if any one had been injured by such gratings, though the

person who placed them there might be liable also.

Harrison, Q.C., for plaintiffs.

M. C. Cameron, Q.C., and Guthrie, for defendants.

MCKENZIE ET AL. V. DEWAN ET AL.

Joint Stock Company under C. S. C. ch. 63—Liability of stockholders—Payment of stock—Registration of certificate—Pleading—Departure.

The C. S. C. ch. 63, enacts that the stockholders of any company incorporated thereunder shall be "jointly and severally liable" for all debts and contracts made by the company. *Held*, nevertheless, that a creditor might sue one, or any number more than one, of the stockholders.

In an action by creditors of the company against five shareholders, the declaration, after setting out an unsatisfied judgment recovered, by plaintiffs against the company, alleged that the defendants, before the debt was contracted and before this suit, were stockholders, and had not paid up their shares in full, whereby defendants became liable to pay said judgment.

Three of the defendants pleaded that they were not stockholders when the contracts, in respect of which the notes were given were made, nor from thence until, nor at, the commencement of this suit. The plaintiffs replied that these three defendants were trustees of the company, and omitted to make the annual report required by the statute, whereupon they became individually liable for the debts of the company. *Held*, that the replication was a departure, in alleging a different ground of liability from that taken in the declaration, and a ground which applied only to three out of the five defendants, and that in this latter respect there was a misjoinder.

The second plea, by two of the defendants, alleged that within five years of the incorporation of the company they paid up their full shares, and before this suit, to wit, on the 1st October, 1873, a certificate to that effect was made, &c., and was duly registered, &c. "in the manner required by the statute in that behalf." *Held*, following *pro forma*, the decision in the C.P., in *M'Kenzie v. Kitchridge*, 24 C.P. 1, that the plea was good, though not shewing that the certificate was registered before the debts, on which the judgment was recovered, were contracted.

This Court, however, did not agree with that

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NOTES OF CASES.

[Ontario.]

decision, but considered, taking together secs. 33, 34 and 35, that to protect himself from liability a shareholder must register his certificate of payment; and that if registered within thirty days from the payment, the exemption would relate back to the time of payment, but if not, would begin only with the registry.

The fifth replication to the second plea, was that the defendants were original stockholders, and that the whole capital stock had never been paid in, and that the debt in the declaration mentioned was contracted by the company before the payment in full of the defendant's shares, and before registration of the certificate. *Held*, good; and that under sec. 33, a shareholder complying with the requirements is discharged from liability, though the full capital stock is not paid up.

The sixth replication denied that the certificate of payment mentioned was not made and sworn to, nor registered within thirty days after such payment as in the said plea alleged, in the manner by the said act directed. *Held*, bad, for the plea did not allege a registration within thirty days, and if before the contraction of the debt it would discharge the defendants, though not within the thirty days.

Another defendant, O., pleaded that he had paid up his shares in full, and had made and registered a certificate as required by the act, and had done the same in the time and after the manner required by the act to free him from personal liability for the debts of the company. The third replication to it was the same as the fifth replication to the second plea, and was *held*, good.

Held, also, that both pleas were improper in form, in pleading matter of law—that the certificate was duly registered, &c.,—instead of alleging the facts, when it was registered or when he paid up in full, &c.,—which the jury could try.

The fourth replication to O.'s plea was similar to the sixth replication to the second plea. The defendant O. rejoined, on equitable grounds, that before the debt in the declaration mentioned was contracted, and before this suit, he had paid his shares in full, of which the plaintiffs had notice, and that he registered the certificate of payment as soon as he knew that it was required by the act. *Held*, that the rejoinder was bad, and being a departure from the plea; but that otherwise it showed a good answer on the merits.

Burton, Q.C., and *Robertson*, Q.C., for plaintiffs.

Harrison, Q.C., and *McCreith* for defendants.

VACATION AFTER HILARY TERM, 1875.

OSBORNE ET AL. V. PIERSON.

Promissory Note—Consideration—Pleading.

In an action on a note by payee against maker, a plea that there was never any value or consideration for the making the said note or paying the same, is bad on demurrer; it should state the circumstances under which the note was given, and deny that there was any other consideration than alleged.

*Hoyle*s for plaintiffs.

Meyers for defendant.

MACMATH V. CONFEDERATION LIFE ASSOCIATION.

Agreement to furnish security to defendants' satisfaction—Construction—Condition precedent.

The declaration was upon an agreement by defendants to employ the plaintiff as their agent to obtain applications for policies, alleging their refusal to take him into their service as agreed. Defendants pleaded that the agreement was subject to a condition that the plaintiff's appointment should not go into effect until he should have furnished security satisfactory to the defendants' general board for the due performance of his duties: that he did not furnish such security; and that his appointment never went into effect. The plaintiff replied that he did furnish such security as ought reasonably to have satisfied the board, and that the board unreasonably, capriciously, and improperly refused to be satisfied therewith.

Held, replication bad; for the furnishing security satisfactory to the board was clearly made a condition precedent to the appointment, and it was not alleged that defendants were not acting *bona fide* under an honest sense of dissatisfaction.

Gordon for plaintiff.

Beatty, Q.C., for defendants.

GWANKIN ET AL. V. HARRISON.

Corporation—Sci. fa. against shareholders.

The 27-28 Vict., c. 23, sec. 27, incorporating the defendants, enacts that every shareholder, until his stock has been paid up, shall be liable to the creditors of the Company to the amount paid thereon; "but shall not be liable to any action therefor by any creditor" until an execution against the Company has been returned unsatisfied, &c.

Held, that *sci. fa.* would lie by a judgment creditor of the Company against a shareholder, though the general practice here is to proceed by action, for a *sci. fa.* is in fact an action.

F. Oeler for plaintiffs.

Ferguson for defendant.

IN RE KENNEDY, AN INSOLVENT, MASON V. HIGGINS.

Insolvency—Claim for rent.

A landlord in case of his tenant's insolvency, has no privilege or preference for rent over any other claim; his only protection lies in his right to a preferential lien on property on the demised premises.

On the facts set out in this case, it was held that there was no ground for ordering the assignee to place the claim for rent as a privileged one, there being no proof that he (the assignee) had obtained goods which might have been distrained sufficient to pay it; and such order was therefore set aside on appeal.

J. K. Kerr, for plaintiff.

O'Brien, for defendant.

POTTS V. LEASK AND RYERSE.

Co-contractors—Payment by one—26 Vict., c. 45.

An action having been brought and a judgment recovered against two defendants on a contract by them to carry certain lumber, the verdict and costs were paid by one defendant, who thereupon, without applying to the plaintiff or tendering him any indemnity, issued an execution in his name against the other defendant for one-half of the debt and costs.

Held, clearly not warranted by the 26 Vict., c. 45, and the execution was set aside.

J. B. Read for plaintiff.

A. Cassels for defendants.

MUNRO V. THE COMMERCIAL BUILDING AND INVESTMENT SOCIETY.

Mortgage—Insolvent Act of 1869, sec. 50—Right to distrain for mortgage money.

One M., in May, 1873, mortgaged land to defendants to secure payment of money by instalments, and it was provided that, in case of default, the defendants might distrain. M. made an assignment under the Insolvent Act of 1869, and the plaintiff, as his assignee, entered on the land, which was in M.'s possession, and took possession of certain goods there belonging to him. Afterwards, an instalment on the mortgage being overdue, the defendants distrained

therefor on these goods, which were still upon the mortgaged premises. *Held*, that the defendants' only remedy was by application under sec. 50 of the Insolvent Act, and that they had no right to distrain.

Ritchie for plaintiff.

Beatty, Q.C., for defendants.

VACATION AFTER HILARY TERM, 1876.

BANK OF HAMILTON V. WESTERN ASSURANCE COMPANY.

Insurable interest—Courts auxiliary.

[April 4.]

Declaration on a policy of insurance, whereby defendants agreed with one T. S. to insure him against loss by fire to the amount of \$1,500 on wheat &c., owned by the assured, and that the amount of loss, if any, should be paid by the defendants to the plaintiffs: averments, that the policy was delivered to plaintiffs, who thenceforward and at the time of the loss were interested in said wheat; that the wheat was lost; that all conditions were performed, &c., but defendants did not pay plaintiffs.

HARRISON, O.J., *held*, that the declaration showed an insurable interest both in T. S. and the plaintiffs.

Held, also, that the plaintiffs might properly sue at law, and that their claim was a pure money demand.

The spirit of legislation is to make courts of law and equity auxiliary to each other, and judges should, as far as in their power, consistently with rules of law, act in a similar spirit.

C. Robinson, Q.C., for plaintiffs.

Lockhart Gordon for defendants.

HARRIS V. SMITH.

Easements—"Appurtenant to."

[March 31.]

The owner in fee of two adjoining closes having leased one to B and the other to A,

HARRISON, C.J., *held* that a way, constructed across A's close for the use and enjoyment of B's shop, visible to all when A acquired title, and to which A's deed is made subject, passed by the words "appurtenant to" in the deed to B, which is prior to A's deed.

The law relating to easements discussed, and *Pyer v. Carter*, 1 H. & N., 916, commented on and approved of.

Ritchie for plaintiff.

Allan Cassels for defendant.

REVIEWS—FLOTSAM AND JETSAM.

REVIEWS.

PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY. By Frederick Pollock, of Lincoln's Inn, Esq., Barrister-at-Law, late Fellow of Trinity College, Cambridge. London: Stevens & Sons, 119 Chancery Lane, Law Publishers and Booksellers. 1876.

The title page also states this to be "a treatise on the general principles concerning the validity of agreements, with a special view to the comparison of Law and Equity, and with references to the Indian Contract Act, and occasionally to Roman, American and continental law."

The design of the author is not, as he explains in his preface, to compete with existing works, but rather to supplement them. Coming at the present time, when the division of jurisdiction between Common Law and Equity has to a great extent ceased in England and is gradually disappearing in Canada, a treatise which deals with the inception of contracts, and the more general and broader principles of law on that subject, is especially welcome.

Works on the Law of Contracts, such as those of Mr. Addison and others, admirable and useful though they are, do not give that bird's-eye view of the law (so to speak) which enables one to comprehend at a glance where the roads to Common Law and Equity diverge the one from the other. The object of this author has been to give a concurrent view of the different doctrines of the two jurisdictions; not on the one hand making his work a mere digest of the cases, nor on the other giving a treatise on Chancery procedure in cases where it is sought to rectify the rigour of the Common Law.

The practical advantages of the mode of treating the subject adopted by Mr. Pollock, are as great as the mode is in itself scientific. It is most difficult to get in any available shape the equitable doctrines applicable to a given state of facts as to which, however, the Common Law rules will in all probability be clearly laid down.

The more one examines this work, the more satisfied he must be that the writer must have had a comprehensive knowledge of the subject, and he is certainly most happy in his manner of imparting

that knowledge to others. A book of this kind could not in fact be prepared without much research and learning. It would not be possible, in the way Mr. Pollock has done it, to present to the reader in a lucid manner, in parallel lines, the discrepancies between Common Law and Equity, or wherein the latter corrects the former, or wherein the Civil Law may throw light on the discussion, without a thorough mastery of the subject.

Chap. i. treats of agreements, proposal and acceptance; Chap. ii. of the capacity of parties, sub-divided into natural and artificial persons; Chap. iii. as to the form of contract; Chap. iv. consideration; Chap. v., the effects and incidents of contract; Chaps. vi. and vii. as to unlawful agreements and impossible agreements; Chap. viii. as to mistakes in general; as excluding true consent and in expressing true consent. The next three chapters discuss misrepresentation, fraud and recision, duress and undue influence; Chap. xii., agreements of imperfect obligation.

This work will not do away with such a treatise as Addison on Contracts; but the latter should be consulted after examining this scientific treatise of Mr. Pollock's. One is necessary to the other, and both are necessary to any one who desires full information on a subject which is the most important of any to the practising lawyer.

The book, in its general appearance and necessary details, is all that might be expected from such careful and enterprising publishers as Messrs. Stevens & Sons.

FLOTSAM AND JETSAM.

THE following curiosity in wills has been sent to us: "In the name of God, amen. September the 28th 1856 being the year of our Lord, Dom anno. I Robert Purtell of Norfolk County and township of Wendham is wake of body but of perfect mind and memery: I doe alsoe detest this to be my last will and testimony: I doe alsoe dis avoy all wills and testimonials made before or after this will: I hope to die the Lord have mercy on me: I am determd to devide my estate according to what my mind lads me to (that is my loving and affectionate wife and childring seven), I

FLOTSAM AND JETSAM.

shall gave on to my wife mary purtell all the Lands that I own Containg fifty acres—50 acres in this township to mannage and have charge and controle thereof ontill death shall await on her then my oldest son Edward Purtell shall own the same fifty acres in the saim township providing my son Edward purtell does not goe of or lave the Charg of his mother before he is at age of 21 years being this time in his 15th year, alsoe he is to contennue after he is at age in the same other ways my wife mary purtell may gave said lands onto my son James Purtell. I alsoe charge my son Edward purtell to gave on to my son James purtell the sum of Two Hundred dollars in cash this sum being £50, currency alsoe my son Edward purtell shal pay on to my young son Robert Purtell the sum of two Hundred Dollars being £50 pound currency the are 21 years if by sickness or accedence my son edward should Die said lands shall be giving onto my 2 twee sons James and robert purtell or of my sons 3 may die that the one boys may own the same which he is hear of : Alsoe my daters fore 4 alles, ellan, Briget and Mary Jane purtell shall have a home on said lands and farm house in health or sickness does plevale on them."

A "DIVORCE" lawyer in Chicago has met the fate which all his peculiar species deserve. He was in the habit of advertising in the newspapers in different parts of the country, in terms such as the following: "Divorces legally obtained, without publicity, and at small expense;" "Divorces legally obtained for incompatibility, etc., residence unnecessary, fee after decree." One of the worst phases of the case of the lawyer in question is, that he well knew that incompatibility was not one of the lawful grounds of divorce in Illinois, and that a residence of one year in that state was required prior to filing a complaint for divorce, unless the offence complained of was committed in that state. The advertisement also conveyed the idea that he had the power of manipulating the courts of justice to suit himself. These things being properly presented to the Supreme Court, the "divorce" lawyer was duly disbarred. Breesa, J., who delivered the opinion in the case, thus pronounces upon the practices of these parasites of the profession: "It is not denied an attorney may make any one of the branches of the law a specialty, but he must not, in so doing and acting, use undignified means, or low, disgusting artifices, and, least of all, should not withhold his name from

his advertisements, nor should they be false or contain libels on the courts. No honourable, high-minded lawyer, alive to the dignity of his profession and emulous of its honours, could stoop so low as this defendant has. That he should embellish his papers, contrived in a spirit of barratry, with the emblem of justice, is singularly inappropriate. We have no patience with one who, bearing our license to practice law in our courts, has shocked all sense of propriety, of professional decorum, and of respect to the courts in which he practises. He is an unworthy member, and must be disbarred.—*Albany Law Journal*.

WE trust that strict attention to each of the different kinds of business that appear in the following card will enable the advertiser to make both ends meet. We regret, however, that a Clerk of a Division Court should also be a druggist; there is no saying to what excesses suitors may go in the agony of hatred or disappointment, caused by an adverse judgment. With that eye to business which Mr. M. would seem to possess, he has probably some relation in the undertaking line:—

EDWARD MATTHEWS,
Druggist, Conveyancer and Commissioner in B.R. Deeds, Mortgages
Bonds, &c., *Executed on*
Reasonable Terms.
CLERK OF THE DIVISION COURT.
&c., &c.

The nicety and technical precision required in criminal pleading, have often been the subject of remark. The policy and tautology of Equity pleadings likewise have been animadverted upon. "I remember," said the late Lord Chancellor Campbell, "when Bills in Equity told the same story over and over again, and each time more obscurely than on the previous occasion. When the answer came, the great object in drawing it up was, that however long it might be, it should form only one sentence, in order that if a part of it had to be read, it should be necessary to read the whole! But I am happy to be able to say, that both the bills and answer, which I have lately read, were simple, reasonable, grammatical, and perspicuous." *Hansard N. S. vol. 154, col. 1032.*

LAW SOCIETY, MICHAELMAS TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, MICHAELMAS TERM, 37TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law :
No. 1842—KENNETH GOODMAN.

THOMAS HORACE MCGUTHRIE.
GEORGE A. RADENHURST.
EDWIN HAMILTON DICKSON.
ALEXANDER FERGUSON.
DENNIS AMBROSE O'SULLIVAN.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit.

The following gentlemen received Certificates of Fitness :

THOMAS C. W. HASLETT.
ANGUS JOHN MCCOOL.
DENNIS AMBROSE O'SULLIVAN.
DANIEL WEBSTER CLENDENAN.
GEORGE WHITFIELD GROTE.
CHARLES M. GARVEY.
ALBERT ROMAINS LEWIS.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

No. 2585—GOODWIN GIBSON, M.A.
JOHN G. GORDON, B.A.
WALTER W. RUTHERFORD, B.A.
WILLIAM A. DONALD, B.A.
THOMAS W. CROTHERS, B.A.
JOHN B. DOW, B.A.
JAMES A. M. ATKINS, B.A.
WILLIAM M. READE, B.A.
EDMUND L. DICKINSON, B.A.
CHARLES W. MORTIMER, B.A.

Junior Class.

ROBERT HILL MYERS.
WILLIAM SPENCER SPOTTON.
WILLIAM JAMES T. DICKSON.
WILLIAM ELLIOTT MACARA.
JAMES ALEXANDER ALLAN.
WALTER ALEXANDER WILKES.
WILLIAM ANDREW ORR.
ALFRED DUNCAN PERRY.
JAMES HARTY.
HERBERT BOLSTER.
JOHN PATRICK EUGENE O'MEARA.
CHARLES AUGUSTUS MYERS.
CHARLES CROSBIE GOING.
DAVID HAVELOCK COOPER.
EMERSON COATEWORTH, JR.
WILLIAM PASCAL DESROCHES.
FREDERICH WM. KITTERMASTER.

Articled Clerk.

JOHN HARRISON.

Ordered. That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 8 ; Virgil, *Æneid*, Book 6 ; Cæsar, Commentaries, Books 6 and 6 ; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Cæsar, Commentaries Books 6 and 6 ; Arithmetic : Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams's Equity, Smith's Manual ; Common Law, Smith's Manual ; Acts respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills) ; Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows :—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis's Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario. Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis's Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR MAY.

1. Mon..Prince Arthur born, 1850.
2. Tues..Primary examinations.
4. Thur...Last day for filing petition against election of any Benchers.
7. SUN...3rd Sunday after Easter.
9. Tues..General Session and County Court sittings for York only. Intermediate examination.
11. Thur...Examinations for admission. Can. for call to pay fees.
12. Frid..Examinations for call.
14. SUN...4th Sunday after Easter.
15. Mon..Easter Term begins. Term of Benchers elected in 1871 expires.
19. Frid..Paper Day, Q.B.
20. Sat....Paper Day, C.P.
21. SUN...5th Sunday after Easter. Rogation Day.
22. Mon..Paper Day, Q.B.
23. Tues..Paper Day, C.P.
24. Wed..Queen Victoria born, 1819.
25. Thur..Ascension Day. Princess Helena born, 1846.
28. SUN...Sunday after Ascension.
31. Wed..University College Easter Term ends.

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THE Canada Law Journal.

Toronto, May, 1876.

THE presentation of the address and testimonial to the Hon. John Hillyard Cameron, the Treasurer of the Law Society, referred to in the *resumé* of proceedings of the Benchers for last term, has been deferred until the first day of next term.

In gratifying the conservative desire to preserve the legal functions of the House of Lords, Lord Cairns has framed a tribunal which will be in reality a distinct Court of Appeal. It will neither be the old House of Lords, in which every peer had a vote on judicial questions, nor the more recent "House of Lords," in which the "Law Lords" alone had judicial functions. It will consist of those members of the House of Lords who have filled high judicial offices, and of two new Lords of Appeal, to be chosen from persons of suitable qualifications at the Bar or on the Bench. These new Lords of Appeal are to receive a summons, and sit and vote in the House like other peers, and to be paid each a salary of £6,000 a year. A fusion is gradually to be made with the Judicial Committee of the Privy Council, which now practically consists of the four salaried members. Two additional Lords of Appeal are to be appointed in place of the four judges of the Privy Council, as vacancies occur. The practical result of the whole measure will be the creation of a new ultimate Court of Appeal, styled the "House of Lords," and having two divisions, one of which will deal with colonial appeals. To the colonies, therefore, Lord Cairns' bill is of no very vital importance. To insure the despatch of business, provision is made for continuous sittings of the new Court, unaffected by the prorogation or dissolution of the House of Lords.

SUITS "BENEATH THE DIGNITY OF THE COURT."

SUITS "BENEATH THE DIGNITY
OF THE COURT."

(Second Paper.)

WE now proceed to consider the doctrine and practice in Equity touching suits which are deemed *infra dignitatem curiæ*. For all practical purposes, our investigations may be limited by the Ordinances of Lord Bacon, promulgated on the 29th of January, 1618, which have been declared to be in force in this Province. By Ord. 15 it is declared that "all suits under the value of ten pounds are regularly to be dismissed;" and by Ord. 60, "where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed according to the fifteenth ordinance, such matter is to be set forth by way of demurrer." The present general order in force in England provides as follows: "Every suit, the subject matter of which is under the value of £10, shall be dismissed, unless it be instituted to establish a general right, or unless there be some other special circumstance which, in the opinion of the Court, shall make it reasonable that such suit should be retained:" G. O. ix., rule 1.

After the recognition of the general rule that the insignificance of the subject-matter was a reason for the Court declining jurisdiction, several exceptions were soon established. These may be classified under three heads: (1) Where the suit was for a charity, or for the benefit of the poor, the smallness of the sum involved was no valid objection: *Parrott v. Pawlett*, Cary R., 147, 1 Eq. Ca. Abr., 75. (2) Where the bill was to establish a right. Thus in *Cocks v. Foley*, 1 Vern. 359, a bill for establishing a right to ancient quit-rents of very small value was allowed to be filed. In a very recent case, *Hoskins v. Holland*, 23 W. R., 477, the Master of the Rolls had occasion to consider this exception under the English

general order. He said that a suit to establish a general right within the meaning of the order was a suit which would determine some question for all time. He instanced a tithe suit, and also referred to an unreported case where the sum at stake was twopence; but the Court gave relief on the ground that the result was to establish the general right of the plaintiffs to a toll of that amount. He held that the bill before him, being one filed by the assignee of a policy of marine insurance to recover from one of the underwriters the premium of £3, was not such a suit, as it would establish nothing against the other underwriters. (3) It would, probably, be held under the English general order that the want of jurisdiction in any other court would be such a special circumstance as would justify the interposition of the Court of Chancery. There is no decision to this effect under that order; but such, we have seen, was the well-established and highly reasonable rule at law, recognised in the modern case of *Stutton v. Barment*, 3 Exch. 834. And such appears to have been the practice under Lord Bacon's ordinance. In *Eastcourt v. Tanner*, Cary R., 196, the suit was for a sum under £10, and it was stayed upon it appearing that both parties dwelt within the jurisdiction of the marches of Wales.

The Court refused to interfere by way of injunction and give an account of profits in cases of literary piracy, but left the plaintiff to his remedy by way of damages at law: *Bailey v. Taylor*, 1 R. & M., 73; *Whittingham v. Wooler*, 2 Swanst., 428. So a bill to interplead by a tenant failed when the whole rent actually due was less than £10: *Smith v. Target*, 2 Anst., 529. In these insignificant cases the Court is wont to interpose in various ways: either upon demurrer, when the facts appear on the face of the bill, or at the hearing, if the facts do not so appear, by dismissal of the bill (*Bruce v. Taylor*, 2 Atk.

SUITS "BENEATH THE DIGNITY OF THE COURT."—TRANSFER OF REAL ESTATE.

253), or by taking the bill off the files upon a summary application for that purpose before answer: *Westbrooke v. Brothell*, 17 Gr. 341.

In this case of *Westbrooke v. Brothell*, it became necessary for the Court of Chancery in this Province to act for the first time upon the rule that the subject of the suit was too trivial to justify its taking cognizance of it. The Chancellor (Spragge), with his usual care, adverted to the fact that, in his view, the plaintiff was not left without remedy, as the matter appeared to him to be within the competence of the Division Court. The next case in Ontario was *Gilbert v. Braithwaite*, 3 Chy. Ch. 413, on an appeal from the referee, who dismissed the bill on the ground that the amount involved was only \$24. The Court upheld the order, referred to Lord Bacon's ordinance as being in force here, and gave no effect to the weighty argument of Mr. Moss, that the plaintiff would be without remedy in any other court if the bill was not sustained. Upon this point, we think the authority of this case might well be examined, if it came before the Court of Appeal. The only other reported decision in this Province is *Reynolds v. Coppin*, 19 Gr., 627. There Blake, V.C., refused to grant an administration order at the instance of a legatee whose claim was only \$28, although it was alleged that there were other legacies remaining unpaid, amounting to a considerable sum. We incline to think that in that case the Judge might have properly exercised his discretion to grant the order, but his refusal did not involve the loss of the amount, as steps could be taken in another court to enforce the payment.

Since the Administration of Justice Act, it may be deemed that the rules of Chancery we have been considering are abrogated by the statute. The jurisdiction of that Court is now made in effect co-ordinate with that of the Common Law

courts. The Court of Chancery, therefore, could not now decline jurisdiction in any case when the sum claimed is over forty shillings, and the exceptions which obtain in the Common Law courts should also be given effect to in Equity.

It is on principles analogous with those which we have been considering, that the Court of Chancery proceeds in declining to entertain appeals from the Master when but a small pecuniary amount is at stake. Thus in *McQueen v. McQueen*, 2 Chy. Ch. 344, where it appeared that no principle was involved, Spragge, V.C., refused the ear of the Court to a dispute respecting ten dollars. Reference may also be made to *Re The National Assurance and Investment Association*, 20 W. R., 324, before the Lords Justices, in which they declined to hear an appeal from the Master of the Rolls in a winding-up proceeding, arising out of the application of a solicitor to have a lien declared in his favour for the amount of his costs of proving a claim, which had been taxed at £1 15s.

THE TRANSFER OF REAL ESTATE.

(Communicated.)

WE see in the April number of the *Canadian Monthly* a paper by Mr. Holmsted, in which some suggestions are made for the amendment of the law relating to real estate. The proposals made in this paper may be classed under two heads, viz.: first, the simplification of our present system of land transfer, and secondly, the assimilation of the law of real and personal property as far as possible, so as to make the law relating to realty conform to that which governs personalty.

With regard to the first proposition, it is almost needless to say that the evil

TRANSFER OF REAL ESTATE.

effects of our present system of land transfer are so well known to all practising lawyers, that the introduction of any simpler system which would effectually obviate these defects would meet with the cordial support of the profession.

For the last twenty years the greatest English lawyers have been endeavouring to devise some scheme which shall effect this much desired end; but the glory of delivering the country from the incubus of our present system of conveyancing must rest, not with lawyers, but with a layman whose strong practical sense has enabled him to cope successfully with a difficulty which has foiled the efforts of more than one Lord Chancellor.

In 1862, the late Lord Westbury thought he had discovered a panacea for the evil, and an act was passed under his auspices, of which golden hopes were formed. After a short trial, however, it proved to be a most complete and absolute failure. Mr. Osborne Morgan, of Burial Bill notoriety, in 1874 thus amusingly depicted its collapse: "The present duties of the Land Registry Act Office in Lincoln's Inn Fields consists not in putting titles on the register, but in taking them off. He had been in the habit of passing it daily for many years, and in that long course of time he never saw a single person enter it. The courtyard leading to it was a wilderness; it was covered with grass and weeds—weeds, he might say, grown as high as a man—and was as desolate in appearance as any property that had been in Chancery." Such was the result of Lord Westbury's labours.

Repeated failures, however, have not resulted in despair; on the contrary, renewed efforts have been recently made, and resort has at last been had in England to the South Australian system, the introduction of which into this country is advocated in the paper we have referred to. The Imperial Statute 38 & 39 Vict.,

cap. 87, which came into force on the 1st January last, is based on the South Australian system of Sir Robert Torrens.

The object of the act is to enable land to be transferred somewhat on the same principle as ships are now transferred, and to secure indefeasible titles to owners of real estate. It aims at getting rid of the necessity of investigating the rights of prior owners, and thus doing away with lengthy abstracts and searches into prior transactions in reference to the land, which is the necessary consequence of our present system. The English act is a modification of the Australian, and whether or not it is likely to prove as efficient in its operation, it can hardly fail to be productive of beneficial results.

The English act admits of the registration of three classes of titles. (a) Those that have been submitted to judicial investigation and are found to be absolute and freed from encumbrances; (b) Those that have been submitted to judicial investigation and are found subject to certain specified qualifications; and (c) those which have not been submitted to judicial investigation, and which are only claimed to be possessory. As to the first two classes, the title of the registered proprietor as it appears on the register is to be absolute and indefeasible, but as to the third class, the rights of any claimants adverse to that of the first registered proprietor are preserved, and may be enforced notwithstanding registration. As to this last class, Lord Selborne, when speaking on the subject in 1873, said: "We think that a registration founded on ostensible or possessory ownership should be permitted in the first instance; in the meantime the titles would be as good at least as they are at present; every year would tend to bring nearer the time when the register alone would be sufficient to prove the title, and every transfer would be unattended with a considerable portion of the present expense."

TRANSFER OF REAL ESTATE—LAW SOCIETY.

In Australia we believe every title must be submitted to investigation before registration, and the third class of cases, which is admitted to registration under the English act, is practically excluded under the Australian act, unless the possession can be shown to be of sufficient length to give a legal title.

The want of a universal system of survey in England has also rendered it necessary to provide that there the registration shall not be conclusive as to the boundaries of the land registered, which is considered by Sir Robert Torrens a very serious defect in the act. It is one, however, that we should be able to avoid in case the measure is ever introduced here.

The practical success of the South Australian act has been proved beyond all question. It only came into operation on the 2nd July, 1858, and yet by the 31st December, 1869, 2,763,887 acres had been brought under its operation, leaving only 1,193,039 acres under the old system; and this satisfactory result was attained notwithstanding the act is not compulsory.

The subject is one that must obviously soon engage the earnest attention of the Legislature of this Province; though, owing to the system of registration which has prevailed in this country, the difficulties and hardships which prevail in England are not felt here to anything like the same extent. The act for quieting titles was a step in the direction indicated, but that act has not been utilized as much as was anticipated, possibly because it was thought proper to apply most rigorous rules in its application. And this made owners of land loath to put a cloud on their titles, should they fail to establish a case sufficient to entitle them to a certificate.

As to Mr. Holmsted's other proposition for the assimilation of the law relating to real and personal property, it is worthy of consideration how far this is desirable, and if desirable, to what extent practicable.

While it is obvious to any lawyer that there can never be a perfect assimilation of the law relating to the two classes of properties, it is nevertheless a fair question whether the laws regulating the rights to real and personal property might not advantageously be brought into closer harmony than they now are.

LAW SOCIETY.

HILARY TERM, 39 VICTORIA.

The following is the *resumé* of the proceedings of the Benchers during this term, published by authority:—

Monday, 7th February, 1876.

The Treasurer being absent, the Benchers elected D. B. Read, Esq., Q.C., to preside in Convocation.

The following gentlemen were called to the Bar, namely: Messrs. E. D. Armour, J. R. Metcalfe, A. R. Lewis, J. W. Frost, and R. G. Cox.

The following gentlemen received certificates of fitness: E. G. Patterson, Robt. Pearson, James Leitch, R. Gregory Cox, T. C. Johnstone, E. P. Clements, W. M. Hall, E. D. Armour, A. E. Smythe, H. Archibald, T. C. Hegler, G. A. Cooke, and D. Lennox.

The petitions of Messrs. W. C. Perkins, F. S. O'Connor, T. G. Blackstock, and A. W. Kinsmans were granted.

Tuesday, 8th February, 1876.

The abstract of balance sheet for 1875 was laid on the table.

ABSTRACT OF BALANCE SHEET FOR 1875.

RECEIPTS.	
Certificates and Term fees.....	\$13,507 44
Notices.....	481 00
Attorneys' Examination fees.....	3,950 00
Miscellaneous.....	3 61
Call fees.....	5,282 00
Admission fees.....	5,680 00
Reports sold.....	217 80
Receipts from Ontario Government.....	5,725 31
Interest.....	1,355 15

\$60,211 31

LAW SOCIETY.

EXPENDITURE.

Salaries and Scholarships.....	\$12,748 00
Hall and grounds.....	7,810 56
Library.....	3,089 11
Rowse & Hutchison for reports.....	4,700 21
Fees returned to rejected students.....	3,127 50
Insurance premiums.....	217 50
Petty expenses.....	425 87
Examiner and Auditors.....	200 00
	\$32,318 25

OUTSTANDING ASSETS DEC. 31st, 1875.

Cash on hand.....	\$ 97 58
Bank deposits.....	22,010 62
Special deposit.....	20,000 00
	\$42,108 20

The report of the Examining Committee for this term was received and adopted.

Ordered, That the secretary obtain from the Dominion Telegraph Company a full return of the receipts and expenditure of the company, in connection with the Osgoode Hall Telegraph Office, to be laid before the Finance Committee, in order that the committee may ascertain what loss, if any, has been sustained by the company in respect of this office, and make such allowance to the company as may seem just.

Messrs. Crickmore and Hodgins were appointed scrutineers for the election of Benchers, to take place in April of this year, and Mr. D. B. Read was appointed to act as and for the treasurer at such election.

Ordered, That the auditors be paid fifty dollars each for their services during 1875.

Ordered, That Mr. Evans be appointed examiner for Easter Term, and be paid fifty dollars for his services this term.

Ordered, That a special meeting of the Benchers be called for Tuesday Evening, the 15th instant, at 7.30 o'clock, to consider the subject of reporting.

Mr. Hodgins reported that the Bill to Amend the Acts respecting the Law Society had passed the Legislative Assembly.

Mr. Boswell was appointed auditor for 1876, in place of Mr. Ewart, whose time has expired.

Saturday, 12th February, 1876.

The petition of Mr. Spragge, to be called to the Bar under the special circumstances stated in his petition, was granted.

Mr. Spragge was called to the Bar.

The petition of Mr. Monkman, to be called to the Bar on passing his final examination, was granted.

The petition of Mr. Stone, to be allowed to present himself for his second intermediate examination next term, was granted.

The petition of Mr. Titus, to be allowed to file his articles *nunc pro tunc*, was granted.

The application of Messrs. A. & W. Diamond was granted.

Tuesday Evening, 15th February.

Resolved, That the fees hereafter to be paid in Michaelmas Term for certificates for attorneys and solicitors, including term fees, shall be thirty dollars per annum, in order to provide for a proper and efficient system of reporting the judgments of the Courts.

The report of the Special Committee on Reporting was received and read, and being slightly amended, was adopted.

Resolved, That a committee, consisting of the Treasurer, Messrs. McCarthy, Armour, McKenzie and Hodgins, be appointed to confer with the Attorney-General on the subject of short-hand reporting.

Resolved, That the increase of salaries of the editor and reporters of the Queen's Bench and Common Pleas shall take effect from the first day of Easter Term last, provided all arrears of judgments unreported be reported by the first day of Trinity Term next; but if not, from the first day of Easter Term next, to apply to each reporter and the editor-in-chief, according to the completion of their respective reports.

Mr. Read gave notice that he would, on Friday, 18th instant, move that a committee be appointed to frame rules and regulations under the Benevolent Fund Act of last session of Provincial Parliament.

LAW SOCIETY—RIGHTS OF PASSENGERS, &c.

The Treasurer here left the convocation room.

Mr. D. B. Read was elected chairman.

Resolved, That, in view of the valuable services rendered by the Honourable John Hillyard Cameron, the respected Treasurer during the last sixteen years, to this society, Messrs. Armour, McCarthy, Hodgins, and Bethune, be a committee to prepare an address and procure some testimonial, to be presented to him, expressive of the appreciation of the Benchers of his valuable services.

Friday, 18th February.

The Hon. Adam Crooks, Q.C., was elected chairman.

Mr. Hodgins, from the committee appointed last meeting, brought up the draft of an address to the Hon. John Hillyard Cameron, at the close of his period of office.

The address was submitted paragraph by paragraph, and adopted unanimously.

Resolved, That the sum of five hundred dollars be appropriated for procuring the testimonial to accompany the address.

Resolved, That the presentation of the address and testimonial be made on Wednesday, the 5th day of April, at the hour of noon.

The treasurer, the Hon. John Hillyard Cameron, Q.C., here entered and took the chair.

Nicholas Flood Davin, Esq., was called to the Bar.

H. C. Gwyn, Esq., was called to the Bar.

The petitions of Messrs. A. J. B. Macdonald, R. M. Meredith, F. VanNorman, E. Thos. Essery, were received. The petitioners were allowed to give notice of application for call under the Act next term in the usual way.

The petitions of J. E. O'Reilly and T. H. A. Bague were received and read, and allowed to stand over until next term.

Messrs. Crooks, MacLennan, Benson, Armour, Bethune, and Hodgins, were ap-

pointed a committee to draft all necessary rules and regulations under the first and second sections of the Act to amend the laws respecting the Law Society, and to report next term.

The petition of the students of the Law School was received and referred to the Committee on Legal Education.

Messrs. Hodgins, McKenzie, Britton, Osler and Read were appointed a committee to frame rules in respect of the benevolent fund, and to report to Convocation next term.

SELECTIONS.

RIGHTS OF PASSENGERS IN
DRAWING-ROOM CARS.

THE case of *Cox v. New York Central and Hudson River Railroad Co.*, 6 N. Y. Sup. Ct. 405, is a very important one in several particulars. The facts of the case were substantially as follows: One Peck purchased at Norwich, Chenango county, tickets for himself, his wife and his daughter, for Albany *via* Utica, over the road of the defendants. On arriving at Utica, the train on defendants' road consisted of drawing-room cars, with one ordinary passenger car in the rear. The plaintiff was making his way to the rear car, but it was so filled with passengers that it afforded no accommodation for his party, and the conductor telling him that there were a few seats forward, and motioning him to that part of the train, they went forward and took seats in a drawing-room car. After they had ridden about twenty-five miles, and while the condition of the rear car remained the same, Peck was required, by the conductor of the drawing-room car, to pay for the privilege of riding in it. He refused to comply with the demand, or remove to the rear car, and in consequence was violently ejected from the train, and his family followed him. Another train came along in about two hours, and the party rode

RIGHTS OF PASSENGERS IN DRAWING-ROOM CARS.

on that to their destination, on the same tickets. There was evidence that the plaintiff was injured in his person by the ejection, and that he suffered from the effects at the time of the trial. There was also evidence that after the plaintiff was removed from the car, and just as he reached the ground, turning around to see if his wife and daughter were following, he was again violently handled by the defendants' servants. The permanent injury consisted in the straining and crooking of one of his fingers, and the temporary injury consisted in being confined to his bed for two weeks. There were two trials. On the first trial the verdict was for the plaintiff for \$8,000, which was by consent reduced to \$5,000, the amount demanded in the complaint. This was set aside by the general term as excessive, Judge Daniels delivering the opinion. Subsequently the plaintiff pressed the cause for a second trial, but the trial was postponed on the defendants' application, on the defendants' stipulating that if the plaintiff should die the action should not be deemed to abate. The plaintiff afterward died, the action was revived by his executor, a second trial was had, and a verdict was rendered for the plaintiff for \$4,000. On appeal the general term held, first, that the ejection was wrongful; but, second, that the damages are excessive, and consequently the judgment must be set aside; and thirdly, that the action had abated by the death of Peck, and the stipulation of the defendants could not revive it, and therefore no new trial should be ordered and no costs allowed.

It seems to have been conceded by Judge Daniels and Judge Boardman, who delivered the opinions on the respective appeals, that the decedent was wrongfully ejected from the train. Judge Boardman observes: "So long as the defendant furnished a sufficient number of trains, with a sufficient number of proper cars, to accommodate the travelling public on the line and route of its road, it had the right to run extra or special trains with special or drawing-room cars, charging for seats or rooms therein, and to exclude from such cars all persons refusing to pay extra for seats therein. But every such train should, in some way, be so marked, designated or

guarded, as that no passenger could get upon it without notice of its special character. In this case it was not so guarded." So far, then, this case seems to be an adjudication that if a passenger is permitted to enter upon a train, and cannot find a seat in the ordinary cars, he may lawfully enter a drawing-room car and occupy a seat therein without extra charge.

In the second place, as to the damages. If the views of these two general terms are sound, why not abolish the jury at once, and let the general term pronounce on the question of damages? In respect to the first verdict Judge Daniels remarks, that it "warrants the conclusion that prejudice, partiality, excitement or bias controlled their action;" and Judge Boardman observes, "that the jury must have been influenced by prejudice, passion or something outside the case itself." This is all very well in theory, but we fail to see how the verdicts evince any such thing. They may be higher than these judges or ourselves would have awarded, or they may not, but if a verdict of twelve jurors must be just what a bench of three judges think it ought to be, pray what is the use of the jury? If the jury had awarded one hundred thousand dollars or twenty thousand dollars, there might be some warrant for the remarks of the judges, but it really does not seem to us that a verdict of \$4,000 or even \$5,000 is so startling or unusual as to lead to the conclusion that it must be the result of passion, prejudice or partiality. If Judge Daniels had been the passenger in question, and had been "yanked" out of a car, his wife and daughter following in terror, and been assaulted again on reaching the ground, and had had his hat knocked off, and his hand so permanently disabled that he couldn't write those elaborate opinions of his, which the whole profession are so apt to sit up nights to read, without pain and suffering, we guess that he would not have thought \$5,000 too much to soothe his physical hurts and his wounded feelings, and that the fact that he was enabled to take the next train and "reach Troy in time for tea," would hardly have balanced the account. Judge James says: "It was the duty of the deceased, on being informed of the situation, either to pay the extra charge or

leave the car and look to the corporation for redress." We wish, if possible, to speak and think respectfully of judges, but really it does sometimes seem to us that being raised into the rare atmosphere of the bench, some men forget the conditions and necessities of the common world below, and endeavour to square earthly affairs with the standards prevailing in their own cerulean region. In view of the final result of this case, we think it a great pity that the judges did not notify the plaintiff, on the first appeal, just how much of a verdict they would approve.

This brings us to consider the eventual shipwreck of the case by reason of the plaintiff's death. When the action came up for a new trial the plaintiff was ready, but the defendant was not; the defendant moved for a postponement, and this was granted on his stipulating that, if the plaintiff should die before the action could be tried, the action should not abate. Now, two judges of the general term decide that this stipulation was outside the powers of the attorneys who made it; that the attorneys could not alter the law by stipulation; and that the second trial was a nullity. Well, if it was a nullity we do not see any excuse for all the discussion about excessive damages, unless the Court felt that two poor reasons were equal to one good one. In regard to the idea of abatement Judge James correctly says, in his dissenting opinion: "It has been repeatedly held that the Court, on application to put a cause over the circuit, has power to impose, as a condition, that the party shall stipulate that the cause shall not abate in case of plaintiff's death," citing *Ames v. Webbers*, 10 Wend. 576, "and having accepted it, and availed itself of its benefit, the defendant is estopped from denying the power of its agent to make it." Just so, we suppose, if a party asks a postponement of a cause not referable, and the Court grants it on condition of his assenting to a reference, and he accepts the condition, he will not afterward be tolerated in claiming that the reference was void because it deprived him of his right to a jury. A party has a right to assent and submit to an illegal judgment against him, and if he agrees to do so, and his consent confers on him a benefit and deprives the other party of a

right, he must not be allowed to retract that consent.

It is no wonder that the public, on reading such a decision as this, jump at the conclusion that law is not common sense, and rail against the lawyers and the courts.—*Albany Law Journal*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

RICHARDSON V. SHAW.

Interpleader—Jurisdiction—Prohibition—Waiver.

Where a judge makes an order, which, though possibly erroneous in itself, is made at the request of one of the parties and is acted upon, a prohibition at the request of such party will be refused.

[February 9, 1876—GUTHRIE, J.]

The defendants, Shaw & Campbell, obtained judgment against one George Richardson in 1874 for \$339.98 damages and costs, in the County Court of the County of York, and issued execution directed to the Sheriff of Hastings. The sheriff seized certain goods and chattels in the possession of said Richardson, which the plaintiff, Ellen Richardson, claimed. An interpleader issue was directed to be tried at Toronto by the Judge of the County Court of York, which issue was afterwards ordered by the said Judge to be tried before the Judge of the County Court of Hastings, by consent of all parties. The issue was tried by the Judge of the County Court of Hastings, and verdict given in favour of the claimant, the plaintiff. The plaintiff afterwards obtained an order from the Judge of the County Court of York for the payment of costs by the defendants, and signed judgment and issued execution.

A summons was thereupon obtained, calling on the County Judge of York and the plaintiff to show cause why a writ of prohibition should not issue to restrain further proceedings.

Osler shewed cause, and contended that as the interpleader order was obtained by defendants and subsequent proceedings taken by the defendants, they could not succeed in this application.

D. B. Read, Q.C., contra, relied on *Nicholls v. Lundy*, 16 U.C.C.P. 160, and the cases there cited.

GWYNNE, J.—Judge Willes, in pronouncing the judgment of the Judges to the House of Lords in *The Mayor of London v. Cox*, L. R. 2 E. & I. Ap. at p. 282, says: "There is indeed a distinction after sentence between a patent and a suggested defect, for if the party below, whether plaintiff or defendant, thinks proper, instead of moving for a prohibition, to proceed to trial in the special or inferior court and is defeated, then, if the defect be of power to try the particular issue only (*defectus triationis*, as it has been called), the right to move for a prohibition is gone. If the defect be of jurisdiction over the cause (*defectus jurisdictionis*), and that defect be apparent upon the proceedings, a prohibition goes after sentence." This would seem to be applicable if the order which is assailed here as being in excess of jurisdiction had been made *in invitum*, and even then, after trial, the right to a prohibition would be gone; but here the Judge having jurisdiction over the cause, and having power to make an order sending the interpleader matter to the Judge of the County Court of Hastings, to be dealt with wholly by him, or to retain it in his own Court to be dealt with there, made an order directing the proceedings to be taken in his own Court. Afterwards, because it was more convenient to try the issue in the County of Hastings, he varied his order, on the application and at the request of the defendants and with the consent of the plaintiff, so far as to order the trial of the issue to take place before the Judge of the County Court of Hastings. The parties went down to trial there for their own convenience; it was their own act; the order allowing it may have been erroneous, but having been made at the special request of one party and with the consent of the other, and so drawn up, it could not have been appealed against. If either party repented of his having procured the Judge to make the order, he should have appealed to the Judge himself to revoke it before having been acted upon; but the party applying for the order cannot now, after the issue has been decided against him and the whole matter has been disposed of upon the basis of the verdict, move for a prohibition to prevent his own act having its legitimate consequences attendant upon it, any more than he could have appealed against an order made at his own special request. There is no such absolute right to a prohibition as would enable a party to trifle with the Court after

he found the tribunal of his own selection deciding against him.

Summons discharged.

EAKINS V. FRASER ET AL.

Relictd verifications—Signing judgment on—Reg. Gen. T. T. 1856, 8, 26.

A judgment may be regularly signed on a *relict'd verifications* without a judge's order, and without the signature to the relinquishment being verified by affidavit.

It is proper on entering judgment in such a case to set out the plea, joinder of issue, and *relict'd* upon the roll.

[February 17, 1876—MR. DALTON.]

There were two defendants in this case, Fraser and Aylwin. The defendants appeared by different attorneys, and pleaded separately. The plaintiff joined issue in the pleas of each defendant.

Subsequently the attorney for defendant Aylwin signed *relict'd verifications* in the following form:—

"The seventeenth day of December, in the year of our Lord 1875. And the defendant, Horace Aylwin, as to the plaintiff's replication to his pleas, says that he relinquishes his said pleas and abandons all verification thereof."

The attorney for defendant, Fraser, signed a relinquishment according to the same form.

These relinquishments were signed by the respective attorneys, and given at the request of the plaintiff's attorney, and filed by him. There was no affidavit filed verifying the signatures of the defendants' attorneys. On the relinquishment being filed, plaintiff's attorney signed final judgment. The roll set out the declaration, pleas, joinders of issue and relinquishments, and then continued: "And thereupon the defendants, with the consent of the plaintiff, relinquishing their said pleas by them pleaded to the said declaration, say that they cannot deny the action of the plaintiff, nor but that the plaintiff ought to recover against the defendants his said debt by reason of the premises, whereby the defendants remain undefended against the plaintiff. Therefore," &c.

Order, for defendant, Aylwin, obtained a summons calling on plaintiff to show cause why the judgment should not be set aside on the grounds (amongst others) that it was irregularly signed in this: 1. That no judge's order for the withdrawal of the defendant's plea was made or filed on signing judgment. 2. That if the alleged consent were sufficient, the Deputy Clerk

C. L. Cham.

EAKINS V. FRASER ET AL.—SLATER V. STODDARD.

[Ontario.]

of the Crown should not have signed said judgment without an affidavit of the due execution thereof. 3. Because said judgment was signed while the defendant's pleas were still on the file.

Brough, for plaintiff, shewed cause.

1. The relinquishment is an entry in the nature of a rejoinder—its use has been long recognised—and no order for withdrawal of pleas was necessary; *Rastell's* entries, tit. Appel de Mort p. 49, pl. 6, sp. 52, pl. 15; *McIntyre v. Miller*, 13 M. & W., 725; *Cooper v. Painter*, 13 M. & W. 734 (a); *Hutton v. Turk*, 13 M. & W., 734 (a); *Davidson v. Bohn*, 5 C. B., 170; *Bullen & Leake* Pr., 3rd ed., 672 and 657.

This proceeding is recognised by Reg. Gen. T. T., 1856, No. 8, and here the relinquishment was entered at the instance of the plaintiff's attorney. A relinquishment, being in the nature of a pleading, does not come within the meaning of rule 26, Reg. Gen. T. T. 1856, relating to cognovits. This is shewn by the fact that the proceeding by relinquishment is recognised by rule 8 of the same general rules. And in England, where 1 & 2 Vict., cap. 110, prescribed similar formalities in the execution of cognovits to those prescribed in this province by rule 26, Reg. Gen. T. T., 1856, the proceeding by relinquishment subsequently to that statute, has been held regular: *McIntyre v. Miller*, sup., *Davidson v. Bohn*, sup.

2. As the entry was a pleading, it was unnecessary that the signature of the defendant's attorney should be verified by affidavit.

3. The plaintiff was entitled to allow the pleas to remain on the file, and to set them out in the roll, together with the joinder of issue and relinquishment: *Chitty's Forms*, Bk. vi., c. 4, form 30. The proceedings here are similar to those in case of failure by defendant to rejoin, where, although it was formerly considered that the plaintiff should cause the replication and plea to be struck out, and then enter judgment for default of a plea, it has since been settled that he may, at his option, either adopt that course or set out the plea and replication on the roll, together with a suggestion of the default in rejoining, and enter judgment for default of rejoinder: *Lawes v. Shaw*, 5 Q. B. 322. But even if the pleas should have been struck off the files, it was the duty of the clerk so to have done, and no order was necessary for the purpose: *Anon*, Lord Raym., 345; *Tidds N. Pr.*, 413; *Chitty's Archbold's Q. B. Pr.*, 12th ed., 947. And the irregularity (if any) having arisen through an omission of its officer, the Court will not allow the plaintiff to be prejudiced thereby:

Naser v. Wade, 1 B. & S., 728; *Evans v. Jones*, 2 B. & S., 45.

Osler, in reply, cited Reg. Gen. T. T., 1856, 8, 26, and submitted that the present cause came within the rule.

MR. DALTON.—I consider the judgment regular. The plaintiff was entitled to enter judgment on the relinquishment given. I might have had more difficulty in determining as to the validity of a relinquishment where there had been a demurrer to the plea, owing to the rule that a party cannot confess the law against himself; but even that question appears to be settled by the cases in *Meeson & Welsby*. I consider also that the plaintiff was entitled to set out the pleas, joinder of issue and relinquishment upon the roll, so if he desired, and that he acted properly in so doing. I therefore discharge the summons with costs.

Summons discharged with costs.

SLATER V. STODDARD.

Change of attorney—Costs—Payment to attorney's former partner.

[February 29, 1876—MR. DALTON.]

Summons to change the plaintiff's attorney. It was asked that the order should be made subject to the usual condition of payment of the attorney's costs. It appeared, however, that the attorney sought to be substituted was a partner of the original attorney at the time the suit began, and that the former had already received from the plaintiff the costs due by him.

MR. DALTON held that the plaintiff was not liable to the attorney whose name appeared in the writ for the costs which had been paid to his partner, and that the summons must be made absolute without any condition as to payment of these costs, either by the plaintiff or the attorney who received them.

Chief Justice Hagarty recently discharged several summonses in Chambers, on the ground that the stamps upon them had not been obliterated. There seemed to be an impression that if the proper stamps were affixed it would not invalidate the proceedings, but his Lordship held otherwise.

County Court.]

FOWKE v. TURNER.

[Ontario.]

COUNTY COURT OF THE COUNTY OF
ONTARIO.

FOWKE v. TURNER.

Overholding Tenant's Act—"Occupant"—Colour of Right.

A person put in possession of a brickyard and house thereon was dismissed by his employee, but refused to give up possession until certain accounts were adjusted.

Held, that he was an "occupant" overholding without colour of right.

(WHITTY, February, 1876—DARTNELL, J.J.)

Fowke, the landlord herein, was lessee of a brickyard. He put Turner, the tenant, in possession thereof (including a house thereon) as his foreman, for the purpose of making brick. Fowke dismissed Turner for unfaithfulness and drunkenness, but the latter refused to go out of possession, claiming he had a right to retain it until the accounts between himself and Fowke had been adjusted. An order was granted by Burnham, J., and on its return evidence was taken before Dartnell, J., disclosing the above facts, who subsequently delivered the following judgment:

DARTNELL, J.J.—Section 3 of 31 Vict., cap. 26, reads as follows: "If, upon such affidavit, it appears to such County Judge that the tenant wrongfully holds, without colour of right, and that the landlord is entitled to possession, such Judge shall appoint a time and place at which he will inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, and whether the tenant without any colour of right holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise."

My brother Burnham has already held, under the above section that the affidavit filed has made it appear to him that "the tenant wrongfully holds, without colour of right," and "that the landlord is entitled to possession." In other words, that a *prima facie* case is made out, sufficient to justify the issuing of a writ, in case of the non-appearance of the "tenant" after service on him of notice of these proceedings, under sec. 4.

The tenant has appeared; and under sec. 5 I have, as by it directed, "in a summary manner" heard the parties and examined into the matter, and also examined the witnesses; and I have now to consider, as directed by this

section, (1) whether this case is one coming within the true intent and meaning of the second section of the act; and (2) whether the "tenant" holds without colour of right against the right of the "landlord."

Sect. 13 of the act explains *tenant* to mean an occupant, sub-tenant, under tenant, and his or their assigns and legal representatives; and the word *landlord* shall include the lessor, the owner, the party giving or permitting the occupation of the premises in question, and the party entitled to the possession thereof.

Under the agreement proved in evidence, the tenant in this case was let into possession of a brickyard, in which he was to work, making bricks for the plaintiff; and I take it, he was in much the same position as a farm servant, working for wages, and having the use of a house and garden on his master's land, a case of common occurrence in this country.

In such case the right of occupancy would terminate with the determination of the employment, either by effluxion of the time of hiring, or by dismissal. I think Turner is in no better position, and is and has been a mere tenant at sufferance.

I do not think the question whether he was wrongfully dismissed has anything to do with the matter. If he brought an action for wrongful dismissal, his being deprived of possession of the land would be an aggravation of damages. Fowke dismissed Turner, if not a year or more ago, certainly by the demand of possession given in these proceedings, and I think he now overholds without colour of right.

His contention that there are matters unsettled between himself and Mr. Fowke in relation to the accounts between them, arising out of the agreement in question, does not justify him in retaining possession of a property to which he has no right, particularly as Fowke is only a tenant himself, and his term had in part expired, although there is a renewal clause in the lease.

I do not think Turner, as against Fowke, can set up that the latter has no title. It seems to me that all I have to decide is whether, as against Fowke, does Turner hold without colour of right?

I hold that Fowke is "a party giving or permitting the occupation of the premises in question," and that Turner is an "occupant" thereof within the meaning of the act.

I direct the issue of the writ, and I order the defendant to pay the costs.

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IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

MARY ANDERSON (ADMINISTRATRIX OF MATTHEW ANDERSON, DECEASED) v. THE NORTHERN RAILWAY OF CANADA.

(Sept. 15, 1875.)

Railway Co.—Contributory negligence—Evidence—

Appeal from the Common Pleas.

The defendants, under the authority of 12 Vict., cap. 196, and 16 Vict., cap. 51, had constructed a wharf at Collingwood, and laid three tracks thereon for the purposes of their business. The wharf was much frequented and the only means of access to vessels lying at it. The tracks were so close together that it was difficult to distinguish between the tracks and the spaces between them. No portion of the wharf was fenced off for foot passengers, nor was there any railing to prevent persons from falling into the water, and they had either to walk upon the tracks or the spaces between them. A woman carrying her husband's dinner, who was working at a vessel, was walking down the wharf on the outside of the western track, and on meeting some men coming up, she, apparently to avoid them, stepped across on to the centre track, not observing a gravel train backing down along it. Just as the train was upon her, one of these men observing her danger, jumped on to the track and pushed her off, but for some reason hesitating for a moment, was himself struck by the train and killed. It appeared that there was no look-out man on the last car, and the evidence was contradictory as to whether defendants were going more than six miles an hour, and whether the whistle was sounded or bell rung. In an action by the administratrix of the deceased the jury found that defendants were guilty of negligence, and that neither the woman nor the deceased were guilty of contributory negligence, and that she would have been killed had not deceased pushed her off, which was the only means of saving her.

Held, in the Common Pleas, that the plaintiff could not recover, for the deceased was guilty of contributory negligence, his own direct and wilful act, however praiseworthy, being the cause of the accident.

Per HAGARTY, C.J.—*Scoble*, that the woman in stepping on to the track was also guilty of

contributory negligence, and could not have recovered.

Per GWYNNE, J.—Without deciding as to her right, the defendants were bound to exercise a much greater degree of caution in running their trains in such a place than on their ordinary line of railway.

A nonsuit was therefore ordered.

From this judgment the plaintiff appealed.

Per DRAPER, C.J. OF APPEAL.—The deceased was guilty of contributory negligence; and *semble*, that there was also contributory negligence on the woman's part, and no evidence of negligence on defendants' part.

Per STRONG, J.—1. Defendants were guilty of negligence as regarded the woman, but such negligence was too remotely, if at all, the cause of the injury to deceased. 2. The woman could not have recovered, if injured, by reason of her contributory negligence, and if so, neither could the deceased.

Per BURTON and PATTERSON, JJ.—There was clearly negligence on defendants' part, in going at excessive speed, and in omitting to have a look-out man in the rear car, as required by Con. Stat. U.C., cap. 66, secs. 144, 145. The jury were warranted in finding that there was no contributory negligence on the part of the woman, and in finding also that there was none on the part of the deceased, for his act was that of a man of ordinary care and prudence under the circumstances.

The Court being equally divided, the judgment of the Court below was affirmed with costs

D. McCarthy, Q.C., for plaintiff.

Harrison, Q.C., for defendants.

O'BRIEN v. CREDIT VALLEY RAILWAY COMPANY.

(September 18, 1875.)

Railway Co.—Contract with—Authority of agent—Statute of Frauds—Acceptance—Corporate seal.

Appeal from the Common Pleas. (25 C.P. 275.)

The plaintiff, acting under a written contract for the delivery of 12 toise of stone for the piers of a bridge which defendants were building over a river on their line of railway, delivered the amount, and was paid by defendants therefor, as well as for an additional toise and a half, and some sand subsequently ordered by the inspector. The inspector then ordered the plaintiff to deliver some more stone and sand, stating that he did not know what quantity of stone was required, but telling plaintiff to go on drawing

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until told to stop, and the plaintiff then delivered some 26½ toise of stone and a quantity of sand, defendants having furnished the men and teams to assist the plaintiff in doing so. On observing, about the 8th of May, that defendants had stopped work on the bridge, the plaintiff ceased delivering. About the 12th May, he was paid for what had been delivered up to that time, an account being made up by some one acting for defendants, and the hire of teams and men furnished by them being deducted in it from the price allowed, which was \$2 a toise more than that in the written contract. On the work being renewed, and on being ordered by the inspector to continue delivering, he delivered 26 further toise and some more sand. The defendants, however, refused to pay for the latter delivery, contending that they were not liable.

Held, by the Court of Common Pleas, and affirmed on appeal, that the defendants were liable without a contract under seal: 1. That there was sufficient evidence of authority on the part of the inspector to bind the defendants, and of their having adopted his acts: 2. That the contract was not required to be in writing to satisfy the Statute of Frauds; because the stone and sand now in question had been delivered under the order to go on drawing until told to stop, and part of the stone delivered under that order had been accepted and paid for.

Held also, in the Court of Appeal, that the contract did not require to be under the corporate seal, it being one directly connected in its nature with the purposes of defendants' incorporation.

O'Donohoe for plaintiff.

Lockhart Gordon for defendants.

McNISH ET AL. V. MUNRO.

(September 25, 1875.)

Ejectment—Conveyance of land with "the appurtenances"—Construction—Statute of Limitations.

Appeal from the Common Pleas.

In 1848, by a fence intended as a division fence between lots 26 and 25 in the township of Southwold, the land claimed in this action as part of 25 was included with 26, and was occupied by M., the owner of 26, as part of his lot, until 1854, when the error was discovered by a survey. M. assented to the line as then run, and was to have moved his fence, but he continued to occupy until 1856, when he conveyed to the defendant, who entered into possession and occupied up to the fence as M. had done. The deed

purporting to convey the south half of lot 26, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining, or therewith demised, held, and occupied or enjoyed, or taken or known as part and parcel thereof. By deeds made in 1865 and 1874, M. conveyed all his estate and interest in lot 25. In 1875 the plaintiffs, claiming under these conveyances, brought ejectment against the defendant for the part of 25 which had been enclosed with 26, as above stated, contending that M., notwithstanding the deed of 1856 and the delivering up of possession to the defendant, still retained a right of entry, either because the defendant was his tenant at will and so estopped from denying his title, or by virtue of his prior possession.

Held, in the Common Pleas, that whatever interest M. had in the land in question, whether it was part of 26 or of 25, passed to the defendant under the deed to him of lot 26, together with the appurtenances, &c., therewith occupied, &c.

Held, on appeal, that no part of 26 passed by M.'s deed to defendant; but *held*, that the plaintiff could not recover, for the defendant, when he took possession, did not enter as acknowledging any remaining right in M., and therefore not being tenant at will to M. of this piece, or estopped from denying M.'s title, he had acquired title as against the plaintiffs under the Statute of Limitations.

James Bethune for plaintiffs.

W. P. R. Street for defendant.

LINDSEY V. THE CORPORATION OF THE CITY OF TORONTO.

(September 28, 1875.)

Registrars—Plans—Fee for exhibiting—31 Vict., cap. 20, sec. 70, sub-sec. 11—Construction of.

Appeal from the Common Pleas.

The plans filed in the Registry Office of the city of Toronto, were exhibited to two assessors of the assessment department, who used the plans for the purpose of checking, for assessment purposes, the dimensions of the various lots shewn on them.

Held, in the Court of Common Pleas and affirmed on appeal, Strong, J., dissenting, that the registrar was not entitled to charge as for a search on each lot shewn on such plans.

Semble, that unless a plan is an original registered instrument under 31 Vict., cap. 20, sec. 70, no fee is chargeable; but *semble*, on appeal, that it is such registered instrument.

Richards, Q.C., and Beatty, Q.C., for plaintiff.

C. R. W. Biggar, for defendants.

QUEEN'S BENCH.

VACATION COURT.

LEYS V. WITHROW ET AL.

(March 28, 1876—HARRISON, C.J.)

A. J. Act, sec. 9—Transferring case to Chancery.

Declaration: that plaintiff was assignee of a mortgage of realty made by one G. M.; that said mortgage was in default; that G. M. was a partner of H. M.; that said firm was embarrassed, and assigned to defendants as trustees; that defendants accepted the trusts; but though frequently applied to, they neglected to pay the plaintiff, though in a position to divide and pay the proceeds of the real and personal property of the partners; that the greatest portion of the real and personal estate so assigned was the sole property of the mortgagor.

On demurrer, *held* a proper case to be transferred to the Court of Chancery, under sec. 9 of the Administration of Justice Act. The Court of Chancery to deal with the costs.

*McMichael, Q.C., for plaintiff.**W. A. Foster for defendants.*

REDFORD V. MUTUAL FIRE INSURANCE CO. OF CLINTON.

(April 5, 1876—HARRISON, C.J.)

Insurance—Misrepresentation—Over Valuation—Agent.

Declaration: On a policy of insurance against fire on a house, barns, &c.; usual averments as to interest, &c.

Pleas: 1. That misrepresentation rendered the policy void, and that plaintiff falsely represented the value of the dwelling house to be greater than it was. 2. That plaintiff represented that \$1,500 was not more than two-thirds of the value of the buildings, exclusive of the soil, whereas \$1,500 was a far greater value.

Replication to each plea on equitable grounds: that one S. H., the secretary of defendants and their duly authorised agent, and having full knowledge of the value of the buildings, prepared the application, and without any previous inquiry of the plaintiff in that behalf, but acting on his own knowledge and information of and concerning the buildings and the value thereof, acquired in the discharge of his duty as such agent, &c., did write the said values; and the plaintiff, honestly believing the values to be correct, and without concealment, &c., on his part, and at the request of said S. H., as such secretary

and agent of defendants, signed the application so filled up, &c.

On demurrer to the replications: *Semble*, that it is the duty of insurance companies against fire to ascertain for themselves the true value of houses, &c., insured by them, and that misrepresentations as to value by the insured will not affect the policy unless made wilfully or fraudulently, or be designedly untrue. *Laidlaw v. Liverpool and London Insurance Co.*, 13 Gr. approved of. *Semble*, also that the replications were good answers to the pleas.

*C. Robinson for plaintiff.**McGee for defendant.*

RE BRODIE AND THE TOWN OF BOWMANVILLE.

(April 11, 1876—HARRISON, C.J.)

Municipal Law—Tavern and Shop Licenses.

A by-law was passed on the 29th Feb., 1876, by the town of Bowmanville, to limit the number of shop licenses, &c. Clause 2 limited the number of shop licenses to one. Clause 4 provided that the duty for a tavern license should be \$100, and for a shop license \$200. Clauses 5 and 6 practically closed all drinking places after 10 P.M. at night on Monday, Tuesday, Wednesday, Thursday and Friday, and at 6 P.M. on Saturday. Clause 7 regulated the sale of liquor to children, &c. Clause 8 prohibited gambling, swearing, &c., in taverns, &c. Clause 9 prohibited a licensed dealer selling in any place other than that in which he was licensed to sell.

Held, that clauses 2, 5 and 6 were unauthorised, and beyond the power of the Council to pass.

Held, that clauses 4, 7, 8 and 9 were within the power of the municipality to pass.

Held, also, that an objection that the by-law was irrelevant as to time was untenable.

*C. Robinson, Q.C., for plaintiff.**Loscombe for defendants.*

RE RICHARDSON AND POLICE COMMISSIONERS OF TORONTO.

(April 18, 1876—HARRISON, C.J.)

Motion to quash a by-law dated 23d Feb., 1875, on the ground that it prescribed the fee for a tavern license in the city of Toronto at \$160 instead of \$130, as required by sec. 23 of 37 Vict., cap. 32, and that it illegally prescribed the fee payable for March and April, 1876, at \$21.66, i.e. one-sixth of said \$160. That said by-law was not submitted to the electors, though intended to exact over \$130.

Held, that the by-law was valid.*Semble*, as the by-law would become utterly

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effete on 1st May, and no excuse was shown for moving at so late a date, the Court, in the exercise of its discretion, would refuse to interfere.

Biggar for plaintiff.

Hodgins, Q.C., for defendants.

RE DAY AND STORRINGTON.

(April 18, 1876.)

Held, that a by-law passed under 27 and 28 Vict., cap. 18 (Dunkin Act), at the requisition of thirty or more qualified electors, and voted on by the electors, where it is sworn and not denied that many of the voters were prejudiced for want of notice, is void for non-publication of the requisition to pass the by-law. *Coe v. Pickering*, 24 U.C.Q.B. 439, followed.

Oslor for plaintiff.

S. Richards, Q.C., for defendant.

REGINA V. JOHNSTONE.

(April 18, 1876.)

Sweeping Chimneys.

Defendant was convicted before the Police Magistrate, Toronto, on the 23rd February, for sweeping a chimney in the city contrary to the city by-law in that behalf. Sec. 4 of the by-law provided, "That no person other than the chimney inspectors appointed by the Municipal Council shall sweep, or cause to be swept, for hire or gain, any chimney or flue in the city." Sec. 8 provided a penalty for infringement of the by-law. Other sections provided for the appointment of the inspectors.

Held, that sec. 4 was beyond the power of the Corporation, and void as creating a monopoly and restraint of trade, and that the conviction should be quashed without costs.

Biggar for plaintiff.

D. H. Watt for defendant.

COMMON PLEAS.

VACATION COURT.

BROWN V. THE TORONTO AND NIPISSING RAILWAY COMPANY.

(October 1, 1875—GALT, J.)

Railway Co.—Liability to make farm crossings—General issue—Obstruction to highway—Special damage—Pleading—C.S.C., cap. 66, secs. 13, 19.

The first count of a declaration was by the present proprietor of land crossed by the defendants' railway, the railway having been built during the ownership of a former proprietor, by whom the title of way for that railway had

been conveyed, but without his in any way releasing defendants from their statutable duty to make farm crossings, with gates, &c., and averring as a breach defendants' neglect to make such crossings, &c.

The second count was for the obstruction by the defendants of a public highway, alleged to be the only communication between plaintiffs' lands and town line, and averred as special damage that plaintiff was precluded from egress from his residence and a portion of his farm to the said town line; and was thereby prevented from carrying to market the products of his said farm; and also certain cordwood and valuable bush, which was subsequently destroyed by fire and rendered useless.

GALT, J., *held*, 1. That both counts of the declaration were good.

2. That the general issue by statute could be pleaded to the first count.

3. That a plea to the first count, setting up that at the time the railway was built the land was covered with wood and defendants were not notified that a crossing was required, forms no defence, as such a defence could only arise under the 19th section of C.S.U.C. cap. 66, which merely applies to the failure to erect fences.

W. Macdonald for plaintiff.

J. B. Read for defendants.

DINWOODIE V. SMITH.

(October 5, 1875—HAGARTY, C.J.)

Agreement—Construction of—Substituted agreement.

Declaration: That by deed, dated 18th April, 1874, the plaintiffs covenanted, for the consideration therein named, to keep their mill in running order, using due diligence during the season of 1874; to saw, cull, draw and pile all the pine lumber required to be cut thereat, as they might be instructed, and to draw the logs from a named point, the plaintiffs to give three days' notice of their requirement to have the logs delivered at the aforesaid point; and defendant covenanted that if, after the said notice, the said logs were not delivered at the aforesaid point, he would pay the costs and charges of the men and hands kept idle in consequence, but which were not to commence until the expiration of the three days' notice; and the plaintiffs averred that although they had given defendants three full days' notice to have the logs delivered, and all conditions were fulfilled, &c., yet defendant did not deliver the said logs; whereby, &c.

Fourth plea: That before the alleged breach the plaintiffs had given the defendants notice of their

did not require any further logs cut or sawed at the said mill during the season of 1874.

Fifth plea on equitable grounds: Setting out in substance a parol agreement, under which the plaintiffs agreed to saw certain logs known as the Boyd logs, and other logs not included in the first agreement, for his benefit and profit, but on the express agreement and condition that the defendant should not be liable for the costs and charges of the men being kept idle pending the delay; and that plaintiff accordingly sawed the said logs and the other logs on these terms; but the plea did not aver positively the acceptance of a substituted agreement shewing a new cause of action capable of enforcement, or the acceptance of the performance of the new agreement in satisfaction, &c.

HAGARTY, C.J., C.P., *held* that fourth plea was bad; for under the agreement the defendant was not authorised of his own mere motion to put an end to it; that the fifth plea was good, as amounting to a satisfaction after breach.

Remarks as to the present practice of not averring in express terms an acceptance in satisfaction, &c.

J. K. Kerr for plaintiff.

James Bethune for defendant.

JAMES V. HAWKINS.

(October 14, 1876—HAGARTY, C.J., C.P.)

Seduction—Denial of service—Abandonment—C.S.U.C., cap. 77, sec. 2.

To an action of seduction brought by the mother, alleging that the seduction took place after the father's death, defendant pleaded that the daughter was not the plaintiff's servant, and that for ten years before and five years since the cause of action arose, the plaintiff had continually abandoned, and refused to provide for and to entertain the daughter as an inmate.

HAGARTY, C.J., C.P., *held* plea bad; for the mere abandonment could not of itself divest the right of action, though it should affect the damages; and there was no allegation of the cause of action being vested in any other person.

Fitch (Brantford) for plaintiff.

VanNorman, Q.C., for defendant.

DALGLISH V. CONBOY.

(March 31, 1876—HARRISON, C.J.)

Patent right—Agreement of assign—Sufficiency of—Tender of deed for execution—Necessity for.

A declaration alleged that the defendant, being the inventor and patentee in Canada of a certain

buggy seat, called "Daniel Conboy's turn-down seat," agreed to permit the plaintiff, for 15 years from the 8th February, 1876, to have the exclusive right, privilege, and liberty of making, constructing and using, and of selling to others to be used, the right to manufacture and sell the said patent article in the county of Wellington, and of selling it in the province of Ontario; and to prepare, execute, and deliver to the plaintiff a proper and sufficient deed of assignment of the said patent invention, capable of being registered in the Patent Office pursuant to the statute in that behalf, and sufficient to enable the plaintiff to sell the said patent invention as aforesaid. The plaintiff to pay \$200, by \$50 in cash, and the balance on the delivery of the said deed. The declaration then alleged the payment by the plaintiff of the \$50, and of his readiness to pay the balance on the delivery of the deed, and of performance of conditions precedent, &c.; and averred as a breach the non-delivery by defendant of the deed; whereby, &c.

The defendant pleaded that the agreement was in writing setting it out, without any further averment.

The plea was demurred to and exceptions taken to the declaration.

HARRISON, C.J., *held* that the declaration was good; that it shewed a valid agreement for the purposes mentioned; that even if there was any necessity for the agreement being in writing or under seal, which he was of opinion that there was not, the declaration need not so aver; nor need it aver a tender by plaintiff to defendant of a deed for execution, as by the agreement defendant was to prepare, execute, and deliver the deed to plaintiff.

That the plea was bad, as it admitted the agreement and the breach, without confessing or avoiding it.

Robinson, Q.C., for the plaintiff.

Howell for the defendant.

WILLIAMSON V. THE HAND-IN-HAND MUTUAL FIRE INSURANCE COMPANY.

(April 4, 1876—HARRISON, C.J.)

Action on a fire insurance policy on a stock of goods—Action on a policy of insurance.

HARRISON, C.J., *held*, where the claim is for a total loss of the goods, the insured may recover as for a partial loss; and also that a condition providing for certain requisites being complied with by the insured, in case of the partial destruction of the goods, only applies where the goods partially destroyed are the subject of the claim

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but not where the claim is for a portion of the goods totally destroyed.

Robinson, Q.C., for the plaintiff.

MacLennan, Q.C., for the defendants.

IN RE CATON & COLE (INSOLVENTS).

(April 7, 1876—HARRISON, C.J.)

Insolvency—Fraudulent assignment—Separate and partnership creditors—Rights of.

A partnership which had been in existence for some two years, trading under the name of and style of Caton & Cole, was, on the 2d June, 1875, dissolved by a deed of dissolution executed by the partners Cole retiring from the firm, and transferring all his interest in the partnership property to Caton. At this time the firm, as well as the individual partners, were in insolvent circumstances. Caton then proceeded to carry on the business, Cole continuing as a clerk, and the sign of the firm over the place of business remaining unchanged. Subsequently, and within three months after the transfer, Caton absconded, and his estate was placed in compulsory liquidation, and one Murdoch appointed assignee. Murdoch then took possession of the estate and effects, which included what had constituted the partnership assets, and sold the same. The partnership creditors also took proceedings in insolvency against the firm of Caton & Cole, and appointed one Dobbie assignee. Dobbie then, as representing the partnership creditors, demanded from Murdoch the partnership assets or the proceeds thereof; and, on Murdoch's refusal to hand them over, petitioned the County Judge for an order compelling him to do so. The County Court Judge held that, under the circumstances, the transfer was fraudulent and void, and that therefore the partnership creditors were entitled to the assets of the firm; and he made an order directing Murdoch to hand over the same to Dobbie. From this order Murdoch appealed.

HARRISON, C.J., held that the County Court Judge was right, and he dismissed the appeal with costs.

Lash for the plaintiff.

McMichael, Q.C., for the defendant.

CHANCERY.

RE HENDERSON'S TRUSTS.

(March 18, 1876.)

Investment in real estate by trustees—Building.

By a deed of settlement executed prior to the marriage of the parties, certain lands were conveyed to trustees for the benefit of the contracting

parties and of any issue of the marriage, with power to the trustees to sell the lands, or any portion thereof, and invest the proceeds of such sale in, amongst other ways, the purchase of real estate. A portion of the real estate had lately been sold, and the proceeds invested in mortgages. Another portion of the trust estate consisted of a lot in the business part of Toronto, on which it was deemed advisable, in the interest of the *cestuis que trust*, to erect a new building, at a cost of about \$8,000 or \$10,000, and the husband and wife united with the trustees in a petition to the Court (under the 29th Vict., cap. 28, s. 31), asking a declaration that the trustees have power under the trust to raise the money required, and expend the same in the erection of such building.

PROUDFOOT, V.C., declined making an order authorising the expenditure of any specified sum on the building, but expressed a clear opinion that the power to invest in real estate authorised the trustees to expend money in the erection of a building which would be a permanent and substantial improvement on the land; but that "The trustees will have to determine for themselves whether the circumstances are such as to justify the expenditure in that way, and of the amount being proper, and getting the consent of those interested."

J. S. Ewart for petitioner.

ATKINSON V. GALLAGHER.

(April 3, 1876.)

Solicitor and client—Mortgage.

In this case a mortgage for \$1,000 had been created by a third party, who was indebted to defendant, Gallagher, in favour of a solicitor, as security for such costs as he might incur in carrying on a suit for the defendant, Gallagher. It was alleged that the client afterwards consented to the solicitor assigning the mortgage to an amount not to exceed \$500, which was done. This suit was afterwards instituted against Gallagher and his solicitor by the assignee of the security, to enforce payment of that amount.

SPRAGGE, C., held the security valid to the extent only of what was actually due to the solicitor for costs, the assignee of the mortgage having failed to notify the mortgagor of the assignment, by reason of which a sum of \$530 had been by the client allowed to be paid to the solicitor. His Lordship observed that the money still due upon taxation must be paid to some one. It is a matter of indifference to Gallagher to whom he pays it; and as between the solicitor and the plaintiff, there can be no

question that the plaintiff is the proper person to receive it. It seems clear upon the authorities, that a mortgage, given by a client to his solicitor to secure costs yet to be incurred, is absolutely void as against public policy.

Blake, Q.C., and Bain for plaintiff.

C. Moss for defendant.

BROTHERTON V. HETHERINGTON.

(April 5, 1876.)

Mortgage—Improvements.

The defendant had been mortgagee of the premises in question, and subsequently obtained a release of the equity of redemption, giving back a memorandum, by which she covenanted and agreed with the mortgagors, &c., that if they, or either of them, "should at anytime, within three years, pay unto her \$2,000 with interest from 1st May, 1867, and also all costs of improvements made by her upon the said lands since that day, she would reconvey, bargain, sell, release, assign and assure unto them, or either of them, the said lands in fee simple, free," &c.

PROUDFOOT, V.C., *held*, upon appeal from the local master, that the defendant was entitled to be allowed for permanent and lasting improvements, although the estate might not have been increased in value to an amount equal to the sum expended thereon.

Ewart for defendant.

G. D. Boulton for plaintiff.

RE WEEKS—AN INSOLVENT.

(April 5, 1876.)

Appeal from County Judge—Evidence of claim.

In proceedings before the County Court Judge, a claim was put in by the mother of the insolvent, which the creditors opposed the allowance of, on the ground that the mother was indebted to the son in a greater amount than her claim—such claim being distinctly proved by the claimant, her husband and the insolvent. The Judge allowed the claim, from which allowance the inspectors of the estate appealed, and then sought to impeach the claim of the mother altogether as being fraudulent—the only thing that could be suggested in opposition to the evidence stated, being the fact that the money said to have been deposited in the bank by the claimant was in gold—English sovereigns, which the Court was asked to assume was so improbable and incredible, as to be evidence of fraud. This, however, the Court refused to do; and on the ground that the Judge who saw the parties give their evidence having thought the proof

of the *bona fides* of the debt sufficiently established, had allowed the claim.

PROUDFOOT, V.C., agreed in the conclusion at which the Judge had arrived, and dismissed the appeal with costs.

In the same matter, the Judge of the County Court had allowed the claim of the father for \$1,800 against the estate. From this the inspectors also appealed, insisting that the father and son had in reality been partners in carrying on business.

PROUDFOOT, V.C.—I have only considered the evidence on which the Judge of the County Court placed reliance, and upon that evidence I come to the conclusion, that the claimant and the insolvent were partners from early in January, 1873 (7 January), till 1st May, 1875, and therefore that the claimant's proof should be expunged; and that the order of the judge of the 12th of February, 1876, be reversed.

MacLennan, Q.C., for the appeal.

Read, Q.C., contra.

MILLER V. VICKERS.

(April 12, 1876.)

Devise subject to a charge—Practice.

The testator devised certain lands to one John Bishop, subject to a charge of £20 a year, in favour of the plaintiff, to be paid by Bishop. Bishop subsequently sold portions of the devised property, and the annuity of the plaintiff being allowed to fall into arrear, she filed a bill seeking to enforce payment of her annuity against the defendants, who were owners of only part of the estate under Bishop. The defendants objected that the owners of the other portions of the estate should be joined as defendants, in order that all interested might contribute to the amount payable to the plaintiff.

BLAKE, V.C.—I think under the circumstances the most convenient course to pursue will be, as the cause is virtually being heard, to proceed against the present defendants, giving them full liberty to proceed by petition in this cause to add any persons whom they may think liable to contribute with them to the plaintiff's claim. It is more reasonable that these questions should be litigated at the expense of those defendants who seek to make these others persons liable, rather than at the expense of the plaintiff. The rule in mortgage cases does not assist—there the party redeeming gets a reconveyance of the whole estate; and in order to work out the rights of the parties, the whole estate must be represented.

J. A. Boyd for plaintiff.

Fitzgerald, Q.C., for defendants.

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RE McQUEEN—McQUEEN V. McMILLAN
(April 12, 1876.)

Guardian of infants.

The father of the infants having died intestate, his widow obtained letters of administration, and she by her will appointed her sister the defendant, wife of J. L. McMillan, guardian of the infants, her two daughters. After her death, the grandfather of the infants applied to the Judge of the county of Simcoe to be appointed their guardian, who in opposition to objections made by the defendant, did appoint him their guardian, from which decision the defendant appealed to this court.

PROUDFOOT, V.C.—It would have been satisfactory to me if the Judge had seen his way to comply with the wishes of the mother; but in these proceedings, I cannot say he has decided erroneously. Appeal dismissed with costs.

A. Hoskin for appeal.

Moss contra.

SNELL V. DAVIS.
(April 12, 1876.)

Will, construction of—Estate for life—Descent.

Bill for partition filed by brothers and sister of the testator, who died in 1856, leaving his son George Snell, his only child, and the defendant—Davis, his widow, him surviving, after having duly made and published his will, whereby he devised the lands in question to his widow during her widowhood, and after her death or marriage then to his son, George Snell, in fee; and by a subsequent clause in the will the testator provided that, "If my son die and she marry, all to come to my brothers and sister, equal share alike." The widow married again in 1859, and George Snell went into possession as owner in fee. George Snell subsequently died intestate and without issue. Thereupon the plaintiffs, claiming the fee in the land, filed a bill for partition, to which the widow demurred for want of equity.

BLAKE, V.C.—At the time of the marriage the son was alive and enjoying his estate, which I do not think can be taken from him by the at least very doubtful construction put upon the will by the plaintiffs. The son having died, the mother takes the premises. The plaintiffs are therefore not entitled to the relief claimed by their bill, and the demurrer must be allowed with costs.

J. A. Boyd for plaintiffs.

G. Murray for defendant.

KNOX V. TRAVERS.
(April 13, 1876.)

Demurrer—Administration of Justice Act—Fraudulent judgment.

The plaintiff filed his bill on behalf of himself

and all other creditors of the defendant, Travers, alleging that by collusion between him and his co-defendant, a judgment had been fraudulently recovered against Travers in favour of the co-defendant, and executions issued with the object and intent of fraudulently protecting the goods and lands of Travers from his creditors, and alleging fraud under 13 Elizabeth, cap. 5. The bill further alleged, that the plaintiff and other creditors had commenced proceedings at law, and prayed that the fraudulent judgment creditor might be restrained from enforcing his executions. The defendants demurred for want of equity.

BLAKE, V.C., was of opinion that since the Administration of Justice Act came into force, it was not necessary to apply to Equity to set aside a fraudulent judgment, the court of law having ample power to do complete justice to the parties, and work out all equities between them. Demurrer allowed.

Fitzgerald, Q.C., for demurrer.

Hodgins, Q.C., contra.

CHAMBERS.

RE BAZELEY.

(February 7, 1876—PROUDFOOT, V.C.)

Infants—Application of property for maintenance—29 Vict., cap. 17, and 33 Vict., cap. 21, s. 3.

33 Vict., cap. 21, s. 3, (o) only authorises the application of the interest on insurance moneys (apportioned to infants under 29 Vict., cap. 17) for the maintenance of the infants. The principal can, under these acts, only be applied for advancement, but under the general jurisdiction of the Court, may be applied for maintenance.

The deceased father of the infants had insured his life under 29 Vict., cap. 17, for the benefit of his wife and children. The amount apportioned to the children was \$1,000, and was held by a trustee for them.

Foss now applied on behalf of the children, for an order authorising the application of a portion of the principal for the maintenance of the infants.

It was shewn that the income had already been anticipated to the extent of \$100, and that the necessities of the children required payment of a portion of the principal.

Foss for application.

COX V. KEATING.

(February 15, 1876—REDFERN.)

Replication—Introduction into replication of matter by way of confession and avoidance—Order 161.

Replication held irregular which contained

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new matter by way of confession and avoidance of the defendants answer.

Such matter should be introduced by way of amendment to the bill.

Beatty, Miller & Lash for plaintiff.

Hoyles for defendant.

MASTER'S OFFICE.

KENNEDY V. BROWN.

(February 15, 1876—TAYLOR, Master.)

Costs—Higher or lower scale.

A bill was filed for the specific performance of a contract for sale of land, for a sum less than \$150. Before suit the plaintiff, the vendee, had entered upon the land and made improvements upon it, which increased its value to more than \$200.

Held, that the "subject matter involved" in the suit was more than \$200, and that the plaintiff was therefore entitled to costs according to the higher scale.

J. S. Ewart for plaintiff.

Hoyles for defendant.

COMMON LAW CHAMBERS.

HUSTON V. WALLACE.

(March 9, 1876—MR. DALTON.)

Proceeding within a year.

Held, that the obtaining a Judge's order by the defendant to set aside an irregular notice of trial, is not a proceeding within a year, which will entitle the plaintiff to proceed without giving a term's notice.

Small for plaintiff.

T. H. Bull for defendant.

WATSON V. HENDERSON ET AL.

(March 16, 1876—MR. DALTON.)

Interpleader—Parties acting under judicial authority.

An interpleader order was granted in this case in favour of an auctioneer, who had sold goods for the mortgagee of the owner, but had, in obedience to a Judge's order, paid over the proceeds to an assignee of the owner, subsequently appointed in insolvency proceedings.

Ferguson, Q.C., for plaintiff.

Monkman for defendant.

Lash for assignee.

DALZIEL V. GRAND TRUNK RAILWAY CO.

(March 25, 1876—MR. DALTON—HARRISON, C.J.)

Railway company—Examination of "officer."

The Tie Inspector of a railway company is not an "officer" of the company within sec. 24 of the Administration of Justice Act.

G. B. Gordon for plaintiff.

Bethune, Osler & Moss for defendants.

IN THE MATTER OF HENRY SANDFIELD MACDONALD, AND THE MAIL PRINTING AND PUBLISHING COMPANY.

(March 30, 1876—HAGARTY, C.J. C.P.)

Joint stock company—Transfer of shares—Mandamus.

This was an application by the transferee of certain shares in a joint stock company, for a mandamus to compel the directors to enter such transfer in the books of the company, so as to perfect the transfer. The by-law of the company provided that "any shareholder may, by leave of the directors but not otherwise, transfer his share or shares, by making an entry of such transfer in a book," &c. The directors declined to grant the required leave, but gave no reason to the applicant for their refusal.

Held, that it was for the directors to exercise their discretion, and that they need not give any reasons; and having exercised this discretion without any evidence of caprice, the application could not succeed.

F. Osler for plaintiff.

C. Robinson, Q.C., for defendants.

RE ATTORNEYS.

(April 1, 1876—MR. DALTON.)

Attorney and client—Nominal plaintiff.

A client who is merely a nominal plaintiff, being in this case the person in whose name an election petition had been filed, and who lent his name for the purpose of convenience and was not held responsible by the attorney for his costs, is not entitled to an order on the attorney for delivery of his bill of costs, &c.

Creselman for the applicant.

Delamere for the attorneys.

LAIRD V. STANLEY.

(April 15, 1876—MR. DALTON.)

A. J. Act, 1873, sec. 24.—Re-Examination.

An *ex parte* order will not be granted for the re-examination of a party under sec. 24 of Administration of Justice Act, 1873, and special circumstances must be shown.

Sup. Ct. of Er., Con.]

BOLLMAN v. LOOMIS.

[U. S. Rep.]

UNITED STATES REPORTS.

SUPREME COURT OF ERRORS OF CONNECTICUT.

CHARLES F. BOLLMAN v. CLARK M. LOOMIS.

The policy of the law forbids that a person acting as the friend and confidential adviser of a purchaser, should at the same time be secretly receiving compensation from the seller for effecting the sale; and a contract for such compensation is void.

[15 Am. Law Reg., 75.]

Assumpsit, upon the common counts; brought by appeal from a justice to the Court of Common Pleas of New Haven county. The following facts were found by the Court:

In the latter part of the year 1872, Mrs. W. C. Robinson called at the store of the defendant to look at pianos which he kept for sale. She saw there one which pleased her so far as the outside appearance was concerned, but not being willing to purchase entirely upon her own judgment, it was suggested that the plaintiff, who was a friend of F. A. Robinson, a brother of her husband and an acquaintance of hers, should examine the instrument. The plaintiff was to some extent an expert, and his judgment was much relied upon by the Robinsons. Before this time the plaintiff had been an occasional visitor at the store of the defendant, and was well known to the defendant as an expert. The plaintiff and F. A. Robinson visited the store of the defendant together, and the plaintiff, in the presence of the defendant, examined the piano, and found the tone to be good and the instrument a good one, and so expressed himself. His opinion was communicated to Mrs. Robinson. The plaintiff did everything to this point of time in the utmost fairness and good faith towards the Robinsons, and gave them the benefit of his unbiassed judgment. Mrs. Robinson did not, however, immediately purchase, and the plaintiff afterwards happening to be in the store, the defendant asked him why Mrs. Robinson did not buy the piano. The plaintiff told him that he did not know, and explained the relation he sustained toward the Robinsons. The defendant knew that he was acting for the Robinsons, and that the Robinsons relied upon his judgment, and for this reason he requested him to go further than he had before gone, and to endeavour to effect a sale, and to urge the piano upon the Robinsons. This the plaintiff promised to do, and did. A sale was effected, and the plaintiff's exertions and recommendations were instrumental in effecting it. Neither of the Robinsons at any time knew that the

plaintiff was acting for the defendant, and the plaintiff acted for the Robinsons merely as a friend, without reward or pay. After the sale was effected the plaintiff demanded payment for his services, and the defendant then denied that he had ever employed him; but the parties finally settled upon the sum of \$20 as the amount to be paid.

Upon these facts the Court rendered judgment for the plaintiff for \$20 damages and his costs, and the defendant brought the record before this Court by a motion in error.

Newton and Arvine, for the plaintiff in error.
Bollman, for the defendant in error.

FOSTER, J.—The principle involved in this case is doubtless of importance; but the amount involved, pecuniarily, is small; so small is an our opinion hardly to justify bringing the matter here to be decided.

There was gross duplicity on the part of the plaintiff in acting as the confidential friend and adviser of the purchaser of the piano, and at the same time as agent of the vendor, employed by him expressly to effect a sale.

The party proposing to purchase was deceived. Instead of getting, as he supposed he was, the opinion of the plaintiff as an expert, without bias and without interest, acting merely as a friend, the plaintiff was in fact acting as the agent of the owner, and charging fees for his services. A sale having been effected through his influence, this suit was brought to obtain a compensation.

We think there should be no recovery. We reach this result not out of any regard for the defendant; he is as fully implicated in the deception practised on the purchaser as the plaintiff himself. The rule in such cases is, that the law leaves the parties where it finds them. The transaction was inconsistent with fair dealing, contrary to sound policy, and offensive to good morals.

We do not say that the plaintiff or defendant committed a positive fraud. The plaintiff may have said nothing as to this piano which he did not believe to be true, and the defendant may have demanded and obtained for it no more than it was really worth. But the means resorted to to effect the sales deceived the purchaser, and were in violation of confidence. Such contracts and acts are deemed equally reprehensible with positive fraud. They are within the same reason and mischief as contracts made and acts done with an evil intent, and are therefore prohibited by law.

Cases of this character, though differing widely in their details, are unfortunately not

rare in courts of justice. In *Carter v. Boehm* Burr. 1910, Lord Mansfield said: "Good faith forbids either party, by concealing what he knows, to draw another into a bargain from his ignorance of that fact and his believing the contrary." In *Chesterfield v. Janesen*, 2 Ves. 155, s. c. 1 Atk. 352, Lord Hardwicke said: "Fraud may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement." In *Fuller v. Dame*, 18 Pick. 481, Chief Justice Shaw said: "The law avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may affect injuriously the rights and interests of third persons." And again: "If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood."

This case comes within a class of cases described in the books as "poundage for recommending customers to buy." The case of *Wyburd v. Stanton*, 4 Esp. 179, is directly in point. That was an action of assumpsit for goods sold and delivered. The plea was the general issue and set-off. One part of the set-off was for certain poundage and reward before that time agreed to be paid, and then due and payable from the plaintiff to the defendant, upon and in respect of certain goods and merchandise before that time sold and delivered by the plaintiff to one Andrew, for and in consideration of the defendant's having recommended the said Andrew to buy the said goods and merchandise from the plaintiff. Upon this being stated, Lord Ellenborough said he thought this demand could not be supported. It was a fraud on third persons. It was accordingly rejected.

We think this principle a salutary one, and applicable to this case. There is therefore manifest error in the judgment below.

Note by Editor of American Law Register.

There is no principle of the law of contracts of more vital force than that which requires that the same party shall not be interested or act, either as principal or agent, upon both sides. It is but the adaption and enforcement of that fundamental rule of Christian ethics, "ye cannot serve two masters." The rule extends to a large number of those legal relations, resting upon confidence, trust and dependence upon one side, and advice, direction, superiority and control upon the other. Thus an agent will not be allowed to buy or sell for his principal, of any corporation or joint stock company in which the agent is interested, without acquainting his principal with all the facts known to himself, and allow-

ing him to judge for himself, the principal being of full age and competency to act understandingly and prudently: *Taylor v. Salmon*, 4 Myl. & Cr. 130. So one cannot make a binding contract where he acts as the agent of both parties: *N. Y. Central Ins. Co. v. Nat. Protection Ins. Co.*, 20 Barb. 470, where the cases are very extensively cited and judiciously analysed by Mason, J. And in the very recent case of *Raisin v. Clark*, 41 Md. 158, the Court held that a real estate broker, who was employed to sell a property, and effected an exchange for other real estate, could not charge the owner of the latter a commission. The law does not permit the broker in such case to act as agent of both parties even by express agreement. Such an agreement would not be enforced; and a custom of brokers to receive a half commission from each party in an exchange, was held void as against a settled principle of law. So the trustee cannot become interested in the purchase of any portion of the trust estate: *Parkhurst v. Alexander*, 1 Johns. Ch. 394. And the purchase of any portion of the bankrupt estate by the assignee will be treated as a trust for the benefit of the other creditors: *Ex parte Lacey*, 6 Ves. 625. And the same rule will extend to executors and administrators, and to all persons acting as trustees for sale. And the surety is not allowed to purchase the debt for his own benefit, but it will enure to the benefit of the principal debtor: *Reed v. Norris*, 2 Myl. & Cr. 374. So an agent who discovers a defect in the title to land of his principal cannot procure the title for himself: *Ringo v. Binns*, 10 Pet. (U. S.) 260. The principle of these cases is now universally recognised. It is very learnedly discussed by two eminent English Chancellors, in the House of Lords, Thurlow and Loughborough, in the early and leading case of *York Building Co. v. Mackenzie*, 8 British Parl. Cases, in App.: 3 Paton, 378. The rule extends to directors in joint stock corporations, so that they cannot legally derive any personal benefit from any of their transactions on behalf of the company: *Great Luxembourg Ry. v. Magnay*, 25 Beav. 586; 4 Jur. N. S. 830. A director cannot recover for work erected for the benefit of the company, if he was himself interested in the contract: *Stears v. Southend Gas Light & Coke Co.*, 9 C. B. N. S. 180; 7 Jur. N. S. 447.

The rule extends to the avoiding of all contracts procured by taking advantage of the relation of attorney and client: *Corley v. Lord Stafford*, 1 De Gex & Jones 338; *Hobday v. Peters*, 6 Jur. N. S. 794; 8 W. R. 512. The burden, in all cases between attorney and client, is upon the attorney to show that the transaction was entirely equal and fair: *Lyddon v. Moss*, 5 Jur. N. S. 636; *Morgan v. Higgins*, 1 Giff. 270. All securities between attorney and client are presumptively void. The burden rests upon the attorney to support them: *Brown v. Bulkeley*, 1 McCarter 457.

We need not here pursue this question further. The elementary books and the reports abound in wise rules and much beautiful moralising upon them. The rule is even more stringent as between trustee and *cestui que trust*, than between attorney and client, where we have seen it is only required to show the transaction fair; but in the former case the same is equally void, at the election of *cestui que trust*, even where it appears that no advantage was taken: *Cane v. Lord Allen*, 2 Dow 289. Lord Brougham, Chancellor, in *Hunter v. Atkins*, 3 Myl. & K. 213, puts the case of attorney and client upon the same ground, and we see no reason for any distinction in the cases. But, as we said, after much beautiful moralising, we fear this very avenue to fraud

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and corruption is one that it will be found, practically, most difficult to close up. Mere rules of law, or morality, seem to act as a kind of compensation in the minds of too many in our day, perhaps in all times, for giving more or less countenance to exceptional iniquities, upon the principle that all rules must and will have some exceptions, till the latter overbalance and outnumber the former.

I. F. R.

REVIEWS.

THE CANADIAN PARLIAMENTARY COMPANION FOR 1876. Edited by H. A. Morgan, Barrister-at-Law. Eleventh Edition. Ottawa.

This useful little book again makes its appearance—larger and more complete than ever. Not being a law book, and pertaining more to the political world, we cannot be expected to pronounce an opinion on its merits. We will say this, however, that its preparation shows great industry and careful arrangement on the part of the compiler, and that its reputation in the circles best able to judge is very high. No one who reads the papers should be without it.

THE CRIMINAL LAW CONSOLIDATION AND AMENDMENT ACT OF 1869, AS AMENDED AND IN FORCE IN THE SEVERAL PROVINCES OF THE DOMINION. With Notes, Commentaries, Precedents of Indictment, &c., &c. By H. E. Taschereau, one of the Judges of the Superior Court for the Province of Quebec. 2 Vols. Vol. I. published by the Lovell Printing and Publishing Company, Montreal; vol. II. by R. Carswell, publisher, Toronto.

"The following pages will be found to contain the full text of the Criminal Statute Consolidation Acts of 1869, with a synopsis under each clause of the law and the rules of pleading, practice and evidence applicable to it." So runs the preface to the first volume. No cases decided in the Provinces are referred to; but "the reported English cases, down to July, 1874, will be found numerous and largely made use of."

The second volume contains the Criminal Law Procedure Act of 1869, with annotations, and other criminal statutes

of general importance passed since 1869, not inserted in the first volume.

The work professes to be "hardly anything else but a compilation," chiefly of the annotations of Mr. Greaves, Q.C. The forms inserted appear to be wholly from Archbold.

It will be found very convenient to have all the criminal statutes together, in connection with much valuable matter culled from the best English works; but in this connection we cannot help expressing regret that the matter of the two volumes was not compressed into one volume of reasonable size, as it might readily be had the notes and commentaries been inserted as usual in smaller type.

A valuable little work by Hon. Mr. Abbott, Q.C.—the Insolvent Act of 1864, with Notes and Rules of Practice, contained in 100 pages, exclusive of index—could, by the same typographical arrangement as we find in Judge Taschereau's two volumes, be easily swelled into a volume as large as one of these now before us; whilst Harrison's Common Law Procedure Act, a single convenient volume, under the same typographical treatment as Judge Taschereau's book, would form at least six moderate sized volumes. With this, however, the author has usually less to do than the publisher; and though a small matter, it should not be overlooked by a critic, especially in a country where the art of bookmaking has not arrived at that perfection which it has attained in the mother country, though we can show specimens which compare very favourably with the best English works. We find also in the text several suggestions for alterations in the law, and touching the policy of certain provisions; and though some of them are interesting and suggestive, are rather out of place, it seems to us, in a work intended for ready reference and as a circuit companion; at all events, such matter is usually found in footnotes.

We doubt if the learned Judge appreciates properly the difficulty of assimilating and consolidating the criminal laws in force in four provinces, and presenting them in such a shape as to receive the approval of the Legislature—a formidable work, and generally done upon elaborate consideration and discussion by commission, in which all the provinces should be represented. The wonder is, considering the brief time allowed for preparing the consolidation,

SUPREME COURT TARIFF—EXCHEQUER TARIFF.

that so few errors have been discovered. This, however, should not prevent a writer on the subject from entering upon a discussion of the points which suggest themselves to his mind for amendment. We agree with him as to some of his suggestions; others require more than a mere incidental examination, and it would be impossible, in a review of the work before us, to do more than call the reader's attention to them. We should have been glad if the various provincial enactments corresponding with the several clauses in the Consolidation Act had been referred to as well as the Imperial Acts. This would, at least in Ontario and the Maritime Provinces, have added much to the value of the work. While we cannot but notice the matters referred to, the work before us has doubtless cost much time and trouble in preparation; and for those who have not a good criminal law library, will be found very useful for reference.

SUPREME COURT TARIFF.

FEES TO BE TAKED BETWEEN PARTY AND PARTY
IN THE SUPREME COURT OF CANADA—REFERRED TO IN RULE 57.

	\$	c.
On special case required by section 29 of the act when prepared and agreed upon by the parties to the cause, including attendance on the Judge to settle the same, if necessary, to each party,	25	00
Notice of appeal,	4	00
On consent to appeal directly to the Supreme Court from the court of original jurisdiction,	3	00
Notice of giving security,	2	00
Attendance on giving security,	3	00
On motion to quash proceedings under section 37 according to the discretion of the Registrar to,	25	00
(Subject to be increased by order of the Court or of a Judge.)		
On factums in the discretion of the Registrar to,	50	00
(Subject to be increased by order of the Court or of a Judge.)		
Printed case per folio of 100 words, including correcting, superintending, printing and all attendances,	0	30
On dismissal of appeal, if case be not		

proceeded with, in the discretion of the Registrar, to	25	00
(Subject to be increased by order of the Court or a Judge.)		
Suggestions under sections 42, 43, 44, including copy and service,	2	50
Notice of intention to continue proceedings under section 45,	4	00
On depositing money under section 48 in Controverted Election cases,	2	50
Notice of Appeal in Election cases, limiting the appeal to special and defined questions under section 48	6	00
Allowance to cover all fees to Attorney and Counsel for the hearing of the appeal in the discretion of the Registrar, to	200	00
(Subject to be increased by order of the Court or of a Judge.)		
On printing factums, the same fees as in printing the case.		
Besides the Registrar's fees, reasonable charges for postages and disbursements necessarily incurred in proceedings in appeal will be taxed by the taxing officer.		

EXCHEQUER TARIFF.

FEES AND CHARGES TO BE ALLOWED TO ATTORNEYS AND SOLICITORS IN THE TAXATION OF COSTS BETWEEN PARTY AND PARTY.

<i>Instructions.</i>	\$	c.
For informations, statements of claims and petitions,	5	00
For special cases, answers, examinations, demurrers, pleas and exceptions,	5	00
For amended or supplemental information and petition, when such amendment not occasioned by the error or default of the plaintiff,	2	00
For brief, for moving, for injunction,	2	00
For interrogatories and for <i>viva voce</i> examinations of parties or witnesses,	2	00
For special petitions in interlocutory matters,	2	00
For special affidavits,	1	00
For brief in suits by informations, statement of claim or petition of right in cause coming on for trial or hearing,	2	00
To defend proceedings commenced by information, petition, or statement of claim,	5	00

EXCHEQUER TARIFF.

	\$	c.
For instructions for order to revive or add parties,	2	00
<i>The preparations of pleadings and other documents.</i>		
Drawing informations, petitions, or statement of claim not exceeding twenty folios,	5	00
Drawing defence, answer, or other pleading not specially mentioned, not exceeding five folios in length,	2	00
For examining and correcting the proof of any pleading or affidavits or other papers required to be printed, per folio,	0	10
Preparing and filing joinder of issue,	1	00
Suggestion as to the death of parties and the like,	1	50
Affidavit of service of information, statement of claim or petition,	1	50
Special affidavit not exceeding five folios,	1	50
Every bill of costs not exceeding five folios,	2	00
Copies of a notice of motion, order, or certificate to serve, per folio,	0	20
Copies of all other documents or papers, per folio,	0	10
Notice of motion,	1	50
Certificate to appoint guardian <i>ad litem</i> ,	1	50
Summons to attend Judge's Chambers,	1	50
Advertisements to be signed by Registrar, not exceeding five folios in length,	1	50
Every writ of <i>mense</i> or final process, not exceeding five folios,	2	00
For every folio beyond the number provided for in any case, and for drawing or amending every other proceeding, notice, petition, or paper in a cause requiring to be drafted, not herein specially provided for, per folio, of necessary matter,	0	25

Perusals.

For perusing the print of an information, petition, statement of claim or amended information, petition, or statement of claim not exceeding 20 folios,	1	00
For every folio exceeding 20 folios,	0	05
For perusing an amended information, petition, or statement of claim when amended in writing,	1	00
The same rates as above for perusing answers in print or amended answer in writing,		
To the Attorney or Solicitor for perusing		

interrogatories, not exceeding 20 folios,	1	00
For every folio exceeding 20 folios,	0	05
For perusing all special affidavits filed by opposite party, and examinations at the same rate,		
For perusal of copy of supplemental statement and copy of order to revive, each,	1	00
In cases where pleadings or papers are printed, the amount actually and properly paid the printer is to be allowed, not exceeding per folio,	0	30

Attendances.

To inspect or produce for inspection documents pursuant to notice to admit or order for inspection,		
To examine and sign admissions,		
On taxation of costs,		
To obtain or give undertaking to defend, each,	1	00
On a reference, or examination of witnesses or parties, per hour,		
On a summons at Judge's Chambers,		
On consultation or conference with counsel,		
In court on motion, per hour,		
In court on demurrer, special petition or application adjourned from Judge's Chambers, when set down for hearing or likely to be heard,		
On hearing or trial of any cause or matter, per hour,		
To hear judgment, when same adjourned,		
For order made at Judge's Chambers, and to get same entered,		
To settle draft of any judgment, decree, or order,		
To pay money into court, each,	2	00
Every other proper attendance,	0	50

Services.

For service on a party or witness such reasonable charges and expenses as may be properly incurred.

Oaths and Exhibits.

To the Commissioner for oath,	0	25
To the Attorney or Solicitor for preparing each exhibit,	0	25
The Commissioner for marking each exhibit,	0	10

Counsel.

Fee on drawing and settling pleadings, and advising on evidence,	5	00
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EXCHEQUER TARIFF—FLOTSAM AND JETSAM.

	\$ c.
Fee on motion in court, up to	10 00
Fee on argument on demurrer not to exceed	20 00
Fee with brief on trial of issues or hearing, to	40 00
(No more than two counsel fees to be taxed without an order of a judge.)	
Fee on motion for judgment, to	20 00
(The above fees to counsel may be increased by order of the Court or of a Judge.)	

Disbursements.

Besides the Registrar's Fees, reasonable charges shall be allowed to Attorneys and Solicitors for necessary disbursements and postage on services of notices, motions, subpoenas, translations, printing of the same, copies, and other incidental proceedings.

In cases of Special reference, where by order of the Judge or Court the inquiry is to be proceeded with at some place other than Ottawa, the referee shall be allowed travelling expenses not to exceed <i>per diem</i> ,	4 00
For drafting report on reference, per folio,	0 80
<i>Per diem</i> allowance during the time employed on the reference,	10 00
(To be increased by order of the Court or a Judge.)	

When at the request of the parties, with the assent of the Judge, or when by order of the Judge, an examination of witnesses is taken by a short-hand reporter, the expenses of so taking such examination, not to exceed per folio 80 cents, including copy in long-hand to file in the case, may be taxed as costs between party and party.

In actions under \$400, a deduction of one-third of the amount of the fees (other than disbursements) above allowed shall be made by the taxing officer—unless otherwise ordered by the Court or a Judge.

FLOTSAM AND JETSAM.

When Lord Eldon introduced his bill for restraining the liberty of the press, a member moved as an additional clause that all anonymous works should have the name of the author printed on the title page.

In the case of *Musselman v. Musselman*, in the Indiana Reports, vol. 44, p. 107, 1873, we find, among others, the two following head notes:

"Where it does not appear, on appeal, how smoking in court by the judge and attorneys prevented a party from having a fair trial, and the party assigning such conduct as a ground for a new trial does not appear to have objected to it, there is nothing for the Supreme Court to consider in relation to such conduct."

"The assignment as a reason for a new trial, 'that the court erred in sleeping or sitting with his eyes closed during the reading of the written evidence on the part of the plaintiff at the trial of the cause,' is too vague and indefinite. If the judge were asleep, the party should have ceased reading or awakened him; if he sat merely with his eyes closed, it is presumed he did so to hear the more acutely."

In the year 1598, Sir Edward Coke, then attorney-general, married the Lady Hatton according to the Book of Common Prayer, but without banns or license, and in a private house. Several great men were then present, as Lord Burleigh, Lord Chancellor Egerton, &c. They all, by their proctor, submitted to the censure of the archbishop, who granted them an absolution from the excommunication they had incurred. The act of absolution set forth that it was granted by reason of penitence, and the fact seeming to have been done *through ignorance of the law*.—*Middleton v. Croft*, Cunningham, p. 103, 3rd ed.

As an illustration of the absurdities produced by the "codes," the case of *Bennett v. Butterworth*, above referred to by Mr. Justice Grier, is worthy of attention. In that case the Court were unable to discover from the pleadings the nature of the action or the remedy sought. It might with equal probability be called an action of debt or detinue, or replevin, or trover, trespass, or a bill in Chancery. The jury and the Court seem to have laboured under the same perplexity. *The jury gave a verdict for twelve hundred dollars, and the Court rendered judgment for four negroes!*

LAW SOCIETY, MICHAELMAS TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODS HALL, MICHAELMAS TERM, 29TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

No. 1342—KENNETH GOODMAN.

THOMAS HORACE MCQUIRRE.

GEORGE A. RADENHURST.

EDWIN HAMILTON DICKSON.

ALEXANDER FRERGUSON.

DENNIS AMBROSE O'SULLIVAN.

The above gentlemen were called in the order in which they entered the Society, and not in the order of merit.

The following gentlemen received Certificates of Fitness:

THOMAS C. W. HASLETT.

ANGUS JOHN MCCOLL.

DENNIS AMBROSE O'SULLIVAN.

DANIEL WEBSTER CLENDENAN.

GEORGE WHITFIELD GROVE.

CHARLES M. GARVEY.

ALBERT ROMAINE LEWIS.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates.

No. 2585—GOODWIN GIBSON, M.A.

JOHN G. GORDON, B.A.

WALTER W. RUTHERFORD, B.A.

WILLIAM A. DONALD, B.A.

THOMAS W. CROTHERS, B.A.

JOHN B. DOW, B.A.

JAMES A. M. ATKINS, B.A.

WILLIAM M. READE, B.A.

EDMUND L. DICKINSON, B.A.

CHARLES W. MORTIMER, B.A.

Junior Class.

ROBERT HILL MYERS.

WILLIAM SPENCER SPOTTON.

WILLIAM JAMES T. DICKSON.

WILLIAM ELLIOTT MACARA.

JAMES ALEXANDER ALLAN.

WALTER ALEXANDER WILKES.

WILLIAM ANDREW ORR.

ALFRED DUNCAN PERRY.

JAMES HARTY.

HERBERT BOLSTER.

JOHN PATRICK EUGENE O'MEARA.

CHARLES AUGUSTUS MYERS.

CHARLES CROSSIE GOING.

DAVID HAYLOCK COOPER.

EMERSON COATSWORTH, JR.

WILLIAM PASCAL DEROCHE.

FREDERICH W. M. KITTEMASTER.

Articled Clerk.

JOHN HARRISON.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes, Book 3; Virgil, *Æneid*, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries, Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition. Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; last respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. c. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vic. c. 16, Statutes of Canada, 29 Vic. c. 25, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examination shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR JUNE.

1. Thur.. Last day for delivering appeal books in Court of Error and Appeal.
3. Sat.... Easter term ends. Last day for notice for call.
4. SUN... *Whit Sunday*
6. Tues.. Nisi Prius Sittings Co. York.
11. SUN... *Trinity Sunday*.
13. Tues.. General Sessions and County Court Sittings, ex. York. Last day J.P.'s return convictions to Clerk of Peace.
15. Thur.. Court of Error and Appeal sits. Sittings of Oyer and Terminer, Co. York. *Magna Charta* signed 1215.
18. SUN... 1st Sunday after Trinity.
20. Tues.. Accession of Queen Victoria, 1837.
21. Wed... Longest day.
25. SUN... 2nd Sunday after Trinity. Lord Dufferin landed at Quebec, 1872.

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THE

Canada Law Journal.

Toronto, June, 1876.

THE Court of Appeal in England does not appear entirely to possess the confidence of the Bar, at least that portion of it which follows the leadership of the *Law Times*. In speaking of the case of *Dickinson v. Dodds*, 34 L. T. Rep., N. S., 19.

that journal expressed the opinion that Vice-Chancellor Bacon had rightly decided it. The Court of Appeal—consisting of Lords Justices James and Mellish, and Justice Baggallay—however, reversed his decision, whereupon the successful appellant sang a psalm over the periodical thus indirectly “sat upon.” The latter, thus challenged, declined to say anything further until seeing the judgment of the latter Court, and remarks that “In our opinion it would be going much too far to say that the decisions of the Court of Appeal, constituted as it is at present, are indisputable law.”

THE county of Lincoln will be well known in the history of election law in Ontario. The election of Mr. Neelon in 1875 gave rise to an elaborate discussion of the 66th section of the Act of 1868 by Mr. Justice Gwynne, though his very ingenious and forcible argument on that point, and the further discussion of it by the Chief Justice of the Court of Appeal, were not strictly necessary for the decision of the case. The latter held, as will be seen by a full report in another place, that the selling or giving of drink by any person, whether a tavern-keeper or not, to another, within the time and place specified in the section, avoids the election. Mr. Gwynne had decided that the only person who could infringe this section was the tavern-keeper, and consequently he could only avoid the election when he is an agent. The Court of Appeal has, in the *South Ontario case*, which we shall report next month, decided that section 66 is confined to tavern-keepers, but that if the act is done with the knowledge and consent of the candidate, avoidance ensues under sub-sec. 1 of sec. 3 of the Act of 1873; whilst Mr. Gwynne, in the first Lincoln case, limited the treating, &c., to treating with intent thereby to promote the election of the candidate. The second Lincoln case will bring up the construction of what is

THE TREASURER OF THE LAW SOCIETY.

known as the "Whitewashing clause," section 49 of the Election Act of last session. It will be curious if the result is to enable the present petitioner, on behalf of Mr. Neelon, to charge Mr. Rykert with corrupt acts in the first election, which on the first trial were abandoned, and prevent Mr. Rykert, the present respondent, from charging Mr. Neelon, for whom the seat is now claimed, with corrupt acts at the same election, of which Mr. Neelon was on the same occasion proved guilty. The profession do not give the Ontario Legislature credit for very careful legislation, but no one would like to charge them with intentionally perpetrating such an enormous injustice as this.

THE TREASURER OF THE LAW SOCIETY.

It is with no ordinary feelings of pleasure that we draw attention to the following address, accompanied by a suitable testimonial, presented to the Hon. John Hillyard Cameron, Treasurer of the Law Society, on the 20th of May last.

From the time that Mr. Cameron was called to the Bar his name has been prominently before the public. His career as a lawyer is all that concerns us at present. As a young man he was a diligent student, and so thoroughly grounded in the first principles of the law, that his off-hand opinion is accepted with a confidence not usually accorded. He is now by seniority the leader of the Bar, but he acquired that honourable distinction years ago, by a professional career of the most brilliant kind. His learning, his extraordinary memory and wonderful capacity of applying his mind to the subject in hand, added to his natural sagacity, gained the confidence of the profession and others who sought his opinion; whilst the same qualities, combined with a tact, readiness and coolness possessed by few, great

energy and force of character, a large gift of eloquence, a courteous manner and commanding presence, made him the most successful advocate that this country has yet produced.

But to the profession as a body he is not only known as the brilliant leader of the Bar, but as the head of the Law Society. For thirty years—half his life time—he has been a Benchers. Sixteen years ago he was elected Treasurer on the death of Sir James Macaulay, and he has been re-elected continuously every year since. In 1871 the Benchers were made elective by the Bar, and it might have been thought that this would break the charm; but, on the contrary, he was continued in the same honourable position by the direct representatives of the profession, who have now, upon the expiration of their term of office, in a marked manner, evinced their appreciation of Mr. Cameron's services as Treasurer, and of the "esteem and regard in which he is held by the members of the Bar of Ontario."

One of the pleasantest features of the subject before us is the fact that the Bar of Ontario have risen superior to all petty jealousies and personal prejudices, and that political feeling has never been allowed to interfere either with the administration of the affairs of the Society or with the choice of its Treasurer. We trust this may long continue, but it will require a full appreciation by the Benchers of the responsible nature of their position, not only to keep clear of political bias in their deliberations in convocation, (and there has been no difficulty as to *this*) but also, to withstand the importunities of some of the younger and more ardent men, who are so accustomed to the strife of party politics that they forget what is due to themselves and to others as members of the same honourable and independent profession. It cannot but be gratifying to Mr. Cameron, as it is highly honourable to the Benchers, that

THE TREASURER OF THE LAW SOCIETY.

some of his most hearty supporters in convocation are those whose political views are strongly opposed to his own. For his efforts to foster this feeling of professional friendship, a proper *esprit de corps*, and a high standard of professional ethics, as well as for his exertions (ably supported by other Benchers) in improving the legal education and system of reporting, our thanks are due.

The presentation took place in the Convocation Room at Osgoode Hall, which was crowded with members of the Society. Mr. Kenneth McKenzie, Q.C., moved that Sir John A. Macdonald, Q.C., K.C.B., should take the chair, introducing the object of the gathering in a few happily chosen sentences expressive of the appreciation which the profession felt for the many services rendered to it by the Treasurer in his long career of thirty years as a Bencher and sixteen years as Treasurer. The motion was seconded by Mr. James Bethune, Q.C. Sir John Macdonald then, on behalf of the Benchers, presented the address and testimonial in his usual felicitous style, referring to Mr. Cameron not only as one whose public services were entitled to the fullest recognition, but also as an old and tried friend and his schoolfellow of half a century ago.

The address, which was as follows, was then read by Mr. Esten :—

ADDRESS

To the Hon. John Hillyard Cameron, D.C.L.,
Q.C., M.P., Treasurer of the Law Society.

MR. TREASURER,—The Benchers of the Law Society, in convocation assembled, desire at this their last meeting before the general election, to acknowledge the great services you have rendered to the Society, and to express their satisfaction at the efficient manner with which you have so long presided as their chief executive officer in convocation.

During your incumbency the profession has witnessed the establishment of Law Lectureships and of the Law School, affording to the modern students of the law greater facilities for acquiring a sound legal education than those

enjoyed by their predecessors of former years ; the establishment of scholarships, with a yearly stipend, as a reward to the successful student ; provision for intermediate examinations, by means of which the diligent student is enabled to test his ability to master the principles and maxims of the law ; and finally, the means by which the standard of fitness and legal knowledge is now as high as it is at the English Bar.

Not only has the education of the Bar been thus provided for, but our library has been largely increased, and a system of law reporting, which we trust will shortly be made efficient, has been devised, by which the judgments of our courts may be placed in the hands of practitioners almost immediately after their delivery.

While the training of the Bar often brings the members of our learned profession into the keen warfare of active public and political life, it is our boast that no tinge of political bias has ever entered into the discussions of convocation, nor influenced the nomination of Benchers, nor the appointment to any office in the gift of the Law Society—a circumstance due in great measure to the tact, and fairness, and judgment with which you have guided the proceedings of convocation.

Standing as the profession of the law has often to stand before the searching light of a jealous public opinion, and pleading as it does before a judiciary high in legal ability and pure integrity, it has ever been the aim of the Law Society that the reflex of that ability and integrity should be shed around the members of a learned and honourable Bar.

We are only doing justice to your services when we say that in all deliberations of convocation your aim has been to promote those measures which would most largely contribute to the honour, the learning, and the dignity of the Bar ; and in now closing our official term, we express the hope that your example may be an incentive to future convocations to guide the deliberations of the Law Society with the moderation and fairness with which you have guided them in the past. As an expression of confidence and respect in you by the Benchers and profession at large, we beg you to accept the accompanying testimonial, in remembrance and acknowledgment of your sixteen years presidency as Treasurer, and your thirty years services as a Bencher of the Law Society.

Mr. Cameron replied as follows :—

“ GENTLEMEN,

Allow me to express to you my sincere and heartfelt thanks for the address which you have presented to me.

THE TREASURER OF THE LAW SOCIETY.

It is a great satisfaction to me that at the close of the first term of office of those who were chosen by the Bar to represent them in the government of the Law Society, I should receive from them the same kind meed of approbation that was awarded to me by their predecessors, who were the governing body under the old system.

All who have paid any attention to the working of the Society, must be aware of the great progress that has been made in legal education during the last few years, and how sedulously convocation has endeavoured to encourage the student of the law, by offering him those larger facilities for acquiring knowledge, and those greater inducements for attaining a high degree of proficiency, which your address has pointed out; and to the legal profession especially, the large and well selected increase in the library, the additional facilities provided for reporting, and the greater powers granted by the Legislature to the Society, must afford sure and convincing evidence that you have been mindful of the trust that has been confided to you; while the conduct and capacity of the men who have been called to the Bar of late years, must afford evidence equally convincing that your care and attention have had their due effect, and that your labours have not been thrown away.

My profession has ever had my warmest attachment; and it has been my greatest pleasure since I became your Treasurer to endeavour to raise the standard of legal education, and to place the best means of acquiring legal knowledge within the reach of those young men who desired to enter upon the study of the law; and if those measures have met with a fair measure of success, the Bar and the public must give thanks to you, without whose zealous co-operation and constant assistance that measure of success could never have been achieved.

I am most happy to unite with you in your expression of satisfaction, that considerations arising from party politics have never been allowed to enter into our deliberations nor to mar the harmony of our proceedings, and to thank you for the expression of your belief that my aim has ever been, as your presiding officer, 'to promote those measures which would most largely contribute to the honour, learning and dignity of the Bar.'

I accept the testimonial which accompanies your address with the highest appreciation of the kindly feeling which has induced you, as the representatives of the profession at large, to make the presentation; and I can assure you that it will be cherished by my family as their dearest possession long after I have passed away.

And now, gentlemen, in bidding you farewell, permit me to say that during the thirty years I have been a Benchers of this Society, I have ever been associated in its government with a body of gentlemen with whom association was the highest pleasure, and I may truly say that never has the association been continued with a greater charm than during the years it has been had with you. You have always shown me the utmost consideration and courtesy—you have ever been ready to co-operate with me in any proposal that tended to the benefit and advantage of the profession. Year after year you have expressed your confidence in me by unanimously electing me your Treasurer; and now, as your crowning mark of honour, you present me with this splendid testimonial, and part from me with such kind and flattering words, as must live in my recollection as long as my memory lasts."

The address was engrossed on vellum, and beautifully illuminated. The testimonial was a solid silver epergne of unique design, emblematic of the occasion. At Mr. Cameron's special request it was of home manufacture, and reflects great credit both upon the designer and the workman. Upon one side of the pedestal is a view of Osgoode Hall, surmounted by the arms of the Law Society, and on the reverse side are Mr. Cameron's coat of arms, and the following inscription:

"Presented to the Hon. John Hillyard Cameron by the Benchers of the Law Society, on the expiration of their term of office, in May, 1876, as a testimonial of their appreciation of his service during the many years he has been their Treasurer, and of the esteem and regard in which he is held by the members of the Bar of Ontario."

The silver pedestal, standing on a block of black marble, supports a column, round which is a scroll, with the words, "*Magna Charta Angliæ*," and two figures—one, a savage armed with a club, representing the rule of brute force, and the other, Justice, with her sword and balance, representing civilisation, law and order. The shaft supports a silver dish and vase for flowers.

Mr. Cameron has again been chosen Treasurer by the Benchers recently elected.

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LINCOLN ELECTION PETITION.

[Ontario.]

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

(Reported for the LAW JOURNAL by HENRY O'BRIEN,
Esq., Barrister-at-Law.)

LINCOLN ELECTION PETITION.

J. C. RYKERT, *Petitioner*, v. SYLVESTER NEELON, *Respondent*.

32 Vict., cap. 21, sec. 66 (Ont.) *Treating—Implied knowledge by candidate of agent's acts.*

Appeal from the judgment of Mr. Justice Gwynne, avoiding the election and disqualifying the respondent.

His decision sustained as to the complicity of the respondent in the "Stewart case," the particulars of which are set out below, but otherwise as to the "Sunday raid," his knowledge and consent to the corrupt acts of his agents held not proven, the circumstances not being inconsistent with his innocence.

The question discussed as to how far or when a candidate is to be assumed to be aware of, and impliedly consenting to corrupt acts done by his agents, of which, in the natural course of things, he can scarcely be ignorant, or of which he wilfully avoids any knowledge.

Sensu per Draper, C.J., contrary to the opinion expressed by Mr. Justice Gwynne at the trial, that section 66 of 32 Vict., cap. 21, must be construed distributively, and that under it the penalty may be inflicted, (1) on a tavern keeper &c., who does not keep his tavern closed during the hours of polling, and (2) on any person, whether a tavern keeper, &c., or not, who sells or gives drink to another within the time and place specified.

[January 22, 1876.]

This was an appeal from the judgment of Mr. Justice Gwynne, before whom the petition was tried.

The effect of this judgment was to disqualify the respondent, as the learned Judge held that he was guilty of personal corruption in the Stewart case (the particulars of which sufficiently appear hereafter in the judgments of the Chief Justice of Appeal and Mr. Justice Patterson), and that he must have had personal knowledge of certain corrupt acts of his agents committed on the Sunday night previous to the election. Another question arose which caused much discussion—viz., the treating by one Larkins, an agent of the respondent, at Doyle's tavern. Mr. Justice Gwynne held that under the interpretation which he placed upon section 66 of 32 Vict., cap. 21, the election could not be avoided on this ground. His decision on this point was not appealed from, but as the law bearing on it

is discussed by the learned Chief Justice of Appeal in his judgment, it is desirable here to refer to the argument of Mr. Justice Gwynne, who, after speaking of the result of that view of the law against which he was contending, said :

"I confess it does appear to me to be inconceivable that the Legislature could have contemplated the possibility of the section in question being open to the construction that whenever any person, whether a resident in the municipality wherein the election is going on or not, and whether an elector therein or not, sells or gives any quantity of spirituous liquors, whether by wholesale or otherwise, to any person, whether an elector in the municipality or not, and although the transaction, beyond all question, had no relation to, and has no effect upon, the election, the section is violated and the penalty incurred. If then it be, as it appears to me to be, impossible that the section should be construed literally, we must, in order to construe it in the sense intended by the Legislature, endeavour to ascertain with what object, and in order to guard against what evil was this section enacted. And I confess that the difficulties suggested against construing the section as containing two separate and independent offences, appear to me to be so great as to involve the necessity of excluding such a construction, and of reading the section as defining one offence to the commission of which the prescribed penalty is attached.

"The prime object of the act, there can be no doubt, was to secure freedom and purity in elections. The particular section in question is placed under the heading 'Keeping the peace and good order at elections.' The giving spirituous liquor directly, for the express purpose of obtaining a vote, or after a vote was given, in pursuance of a promise made in order to obtain the vote, is sufficiently guarded against, independently of this section, as an act of bribery. The indirect influence which might be exercised by the providing any species of entertainment or drink, whether previous to or during the election to any meeting of electors assembled for the purpose of promoting the election at any place except the entertainer's own private residence, where such entertainment is permitted, and the paying or promising or engaging to pay for any such drink or entertainment, was provided against by the prohibition contained in the 61st section.

"Still it remained possible, if spirituous liquors could be obtained at the hotels, taverns, and shops where they are ordinarily sold, that much drinking might be indulged in, which the

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parties partaking of should themselves pay for, and which might injuriously affect the freedom and purity of the election, and from which bloodshedding riots and other breaches of the peace might ensue. Therefore, for greater caution, and with a view to securing that the election should be uninfluenced by any cause arising from the use of spirituous liquors at any of those places during polling day, this section was passed with the intent that 'Every hotel, tavern and shop, in which spirituous or fermented liquors are ordinarily sold, shall be so closed during the day appointed for polling in the wards or municipalities, that no spirituous or fermented liquors shall be sold or given to any person within the limits of such municipality under a penalty of \$100 in every such case.' That is to say, in every case in which any such hotel, tavern, or shop keeper shall in violation of this section sell or give such spirituous liquors or drinks, or permit such to be sold or given upon his premises.

"But assuming this to be the true construction, still the treating which is assailed as in violation of the 66th section of the Act of 1868, occurred at a hotel. Doyle, the hotel keeper, within the polling hours sold the drinks, of which McLellan, Lavelle, and Todd partook. Doyle is undoubtedly guilty of a violation of the section, and upon prosecution liable to its penalty. It may be also admitted that the act of selling by Doyle, as in violation of the section, is, under the provisions of the 1st section of 63 Vict., cap. 2, a statutory corrupt act committed by Doyle, although the act was never contemplated by any one to have, and although it had not in fact, any effect whatever upon the election, and that moreover by this act of sale, Doyle, upon his being proceeded against and found guilty under the provisions of the 49th section of the Act of 1871, will be rendered incapable for a period of eight years of being elected to and of sitting in the Legislative Assembly and of being registered as a voter, and of voting at any election, and of holding office at the nomination of the Crown, or of the Lieutenant-Governor of Ontario, or any municipal office. Still two questions remain:—Firstly, is Larkin also guilty of a violation of the same 66th section within the meaning of that section? And secondly, assuming him to be, and that he was an agent of the respondent, is the latter's election thereby avoided? The answer to the first of these questions depends upon the construction to be put upon the 66th section referred to, and to the latter upon the construction to be put upon the 3rd section of the Act

of 1873. The 66th section undoubtedly says that no spirituous or fermented liquors or drinks shall be sold or given.

"Now in the case in question, certainly in one sense Larkin, as the person treating McLellan, Lavelle, and Todd, may be said to be the giver to them of the drinks which Doyle sold and for which Larkin paid, but it is contended that the section is pointed against the hotel, tavern, or shop keeper, and that it is upon him that the penalty is imposed, and that where a tavern-keeper sells a glass of liquor to A. for the purpose of treating B., who thereupon drinks it while A. pays for it, there is but one act done in violation of the statute, but one offence committed, which is committed by the tavern-keeper, and that two penalties cannot be recovered, the one against the seller and the other against the treator, for one and the same glass of liquor sold. The glass of spirits, for example, which Lavelle drank, was sold only for the purpose of being drunk by him, although Larkin paid for it. For the sale of that glass Doyle is guilty of a violation of the section, and for that glass, for the sale of which Doyle is responsible and liable to be disfranchised for eight years, it is contended that Larkin cannot also be made responsible and be subjected to the like penal consequences as given within the meaning of the act, merely because he pays the price instead of Lavelle. So if a shopkeeper licensed to sell liquors sells a dozen of wine to A., who buys it for the purpose of being sent and orders the vendor to send it to B., a poor friend of A.'s unable to pay for it himself, although this being done within polling hours may make the shopkeeper liable for selling in violation of the statute, it is contended that A., who bought it only that it might be sent to B., to whom the shopkeeper did send it, is not also liable to another penalty as given. This is a point which would more satisfactorily be raised upon a prosecution for the penalty under the statute. I confess there seems to be great force in the argument. If the true view be, as it seems to me to be, that the act was intended alone to point against hotel, tavern, and shop keepers, upon whose premises spirituous liquors and drinks are ordinarily sold, and who have it in their power to control what is done there, then the words 'sold or given' must be limited to the hotel, tavern, or shop keeper, and must mean sold or given by him; the word 'given' being added to prevent the possibility of the party proceeded against for the penalty evading the statute by setting up as a defence that he did not sell, but himself gave the drinks.

"That this is the true construction seems to me to be apparent, when we trace the source from which this 66th section is derived. It and the preceding sections, numbering from 57, are taken from sections 72 to 81 inclusive, which are grouped under precisely the same heading as clauses relating to the 'Keeping of the peace and good order at elections,' in the statutes of Canada, 22 Vict., cap. 6, the 81st sect. of which act, corresponding with the 66th section of the Act of 1868, enacted that 'Every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service; and no spirituous or fermented liquors or drinks shall be sold or given during the said period under a penalty of \$100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks as aforesaid.'

"What was meant by the words in this section, 'in the same manner as it should be on Sunday during divine service,' is not very clear, for there was no law that I can find then in force in Canada prescribing the duty of hotel and tavern keepers to keep their houses closed in any particular manner during divine service on Sunday. [Here the learned Judge referred to the various statutes on this subject, and proceeded]: But none of those statutes which have reference to the period of 'divine service on Sunday' had ever any force in Upper Canada, and it was drinking spirituous liquors at the places which constituted the offence, during the hours of divine service on Sunday. It is difficult, therefore, to understand what the Legislature of Canada meant by the 81st sec. of 22nd Vict., cap. 6, which in plain terms enacted two penalties against the innkeeper—the one for neglecting to 'close his hotel or tavern in the same manner as it should be on Sunday during the hours of divine service,' and the other 'if he should sell or give any spirituous or fermented, liquors as aforesaid.'

"How the offence of neglecting to keep the hotel or tavern 'closed in the same manner as it should be on Sunday during the hours of divine service,' could be committed in the absence of the sale or gift of any spirituous or fermented liquors or drinks, and in the absence of all drinking suffered or permitted at the hotel or tavern, I fail to be able to see, and it seems to me that it was most probably this difficulty which induced the draughtsman of the Election

Law of 1868 to strike out these ineffectual words, and so to amend the section as to do away with the double penalties, and to enact a single offence with a single penalty, which in my opinion is what is done by the 66th section, which offence consists in the selling or giving spirituous or fermented liquors or drinks at any hotel, tavern, or shop in which spirituous or fermented liquors or drinks are ordinarily sold. The word drinks used in the Act of 1868, and in 22 Vict., cap. 6, seems to me very plainly to indicate that what the Legislature desired to guard against was that general habit of 'drinking spirituous liquors' so common at elections, and which was so well calculated to tend to breaches of the peace and violation of good order at elections, which it was the object of that section of the act from which this 66th section was taken to maintain. But it is further to be observed that in all the above statutes in which I find any reference to the words 'during the hours of divine service,' and especially in the 22nd Vict., cap. 6, it was upon the proprietor of the hotel, tavern, or shop where the spirituous or fermented liquors or drinks are ordinarily sold, and who as such is able to control what is done on his own premises that is made guilty of the offence, and upon whom the penalty for any violation of the statutes is imposed.

"In my judgment, the 66th section of the Act of 1868 was not intended to have, and has not, any different effect in this respect, and such person is, in my opinion, the only person who can be pronounced to be guilty of a violation of the statute, and liable to the penalties which it imposes, and consequently he is the only person who, in the terms of section 1 of the Act of 1873, can be said to be guilty of the corrupt practice which that statute declares a violation of the 66th section of the Act of 1868, within polling hours to be.

"It was the retailing of drink, and drinking in such a manner as was calculated to affect the purity and freedom of election, which was the evil intended to be guarded against; and the Legislature, in my opinion, have deemed that object sufficiently attained by making the proprietor of the hotel, tavern, or shop where the spirituous liquors are ordinarily sold, answerable for what he permits to be done in violation of the act.

"But assuming in the cases put of the treat at the hotel, and the purchase of the dozen of wine at the shop, that not only the seller is liable, but also the person who pays the price, and assuming the latter to be an agent for promoting

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the election of a candidate, will the candidate, if elected, forfeit his seat by reason of such act within the meaning of the 3rd section of the Act of 1873, the first sub-section of which enacts that 'When it is found upon the report of a judge upon an election petition, that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, his election, if he has been elected, shall be void.' If a person who is a candidate chooses to appoint as his agent a hotel or tavern-keeper who has an independent interest of his own in violating the statute, and whose violation of it may, as it certainly might, lead to violence endangering the freedom of the election, it would be plainly proper that a candidate who appoints such a person as his agent should have his election avoided, if his agent should so conduct himself in plain contravention of the statute, and we should not stop to inquire whether the violation of the statute did or not in fact affect the election. It is quite sufficient that it was well calculated to do so. And it was because it was well calculated to do so that the section prohibiting such practices, and that pronouncing them to be corrupt, were passed. But it seems to be quite another thing, where an agent, not himself a tavernkeeper, and being in need of refreshment goes to a tavern, and for that purpose buys there a glass of beer, wine, or other liquor for himself, and at the same time treats a friend or two to a glass as he would on any other occasion, such treat having no reference whatever to the election, and, it may be, being given to a person not an elector—in such case, although the tavernkeeper who sells the liquor would undoubtedly be guilty of a violation of the 66th section of the Act of 1868, and so of the statutory corrupt practice declared by the Act of 1873, and even though the agent may also be in like manner guilty, shall the innocent principal in such case have his election avoided by such treat?

"The Legislature, no doubt, may arbitrarily enact that any act, even one in which the candidate is in no way concerned, and which is not done in his actual or supposed interest or in pursuit of the object of the election, may notwithstanding avoid the election, but in the absence of the most express words conveying such an intent, we should avoid a construction having such effect.

"What the Legislature has said upon the subject is contained now in the third section of the Act of 1873, which contains two sub-sections that must be read together, and so as to be con-

sistent with each other. The object and effect of that section was plainly, as it appears to me, to repeal wholly the 69th section of the Act of 1868, which has been in effect though not in terms repealed by the 46th section of the Act of 1871, and to substitute a clause in lieu of the 46th section. That 46th section of the Act of 1871 had enacted that where it is found by the report of the Judge upon an election petition under the act that any corrupt practice has been committed by or with the knowledge and consent of any candidate at any election, his election, if he has been elected, shall be void, and he shall during the eight years next, after the date of his being so found guilty, be 'incapable of being elected to, and of sitting in the Legislative Assembly, and of being registered as a voter and voting at any election, and of holding any office at the nomination of the Crown, and of the Lieutenant-Governor in Ontario, or any municipal office.'

"It might perhaps have been held under this section, prior to the passing of the Act of 1873, that a corrupt practice committed by any person should avoid a candidate's election and subject him to disqualification for eight years if committed with his knowledge and consent, for the only practices which were corrupt were such as were directly or indirectly done by the candidate himself or by some person on his behalf, with a view to the promotion of his election within the provisions of the Act of 1868, or the common law of Parliament, but whether or not there could have been any corrupt practice committed by any one, other than the candidate himself or his agent, to which this 46th section of the Act of 1871 could be applied, it is unnecessary to inquire, for that section is repealed by the 3rd section of the Act of 1873, the 1st sub-section of which very distinctly, to my mind, expresses and declares all the cases in which an election shall be avoided, namely, in the cases only of corrupt practices committed by the candidate himself or by his agent at the election, while the 2nd sub-section declares that in addition to the avoidance so declared by the first sub-section, disqualification shall also ensue when the corrupt act which so avoids the election is done by or with the knowledge and consent of the candidate, that is where it is done by himself personally or by his agent, with his knowledge and consent, for unless done by himself or his agents the election is not avoided at all. The second sub-section carefully abstains from saying that any corrupt practice committed by or with the actual knowledge and consent of any candidate shall avoid

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the election, as the 46th section of the act of 1871 had done; it simply annexes to the avoidance of the election, which the first sub-section regulates and declares, disqualification if the act avoiding the election (which can only be the act of the candidate or his agent) be done with his knowledge and consent; the whole section taken together enacting that any corrupt practice committed by a candidate at an election, or by his agent, shall avoid the election whether done with or without his knowledge, which words can only refer to the acts of the agent, but if done by himself personally 'or with his knowledge or consent,' (which words must also be held here to refer to the act of the agent, to be consistent throughout, for no other act but that of the candidate or his agent avoids the election), disqualification also shall ensue in addition to the avoidance.

"Now the avoidance of a candidate's election being confined to the acts of himself or his agents, what are the acts of an agent within the meaning of these words in the section, 'committed by any candidate at an election, or by his agent?' The first section of the Act of 1873 adds to the category of corrupt practices the violation of the 66th section of the Act of 1868. This violation can, in my judgment, be committed only, as I have said, by the keeper of the hotel, tavern, or shop where spirituous liquors or drinks are ordinarily sold, but such violation of the section may be committed by a person who is an agent of the candidate, in such a manner as to have no reference whatever to the promotion of the purpose for which the agency was created—in such a manner as in no possible way to be capable of having any effect whatever on the election; as, for example, where a candidate and a friend find it absolutely necessary to take the refreshment of dinner at a hotel, and at the dinner partake of their usual reasonable quantity of beer or wine—it may be one or two glasses, supplied by the hotel-keeper as part of the dinner—can it be that the Legislature contemplated not only avoiding a candidate's election, but also of disqualifying him for eight years, because (admitting, for the sake of argument, the hotel-keeper, within the rigid terms of the 66th section, to have been guilty of its violation) the candidate partook of the refreshments so supplied, or paid for what was supplied to his friend, and was, so far as such act could make him, a consenting party to the violation of the act by the hotel-keeper. The 66th section does not say that any person consenting to a hotel-keeper or other person violating the 66th section shall himself be guilty

of a violation of it. I must say that, to my mind, it would be contrary to the plainest principles of common sense and justice, to attribute such an intent to the Legislature, or to put such a construction upon the act. Such a construction would have the effect, in my judgment, of enacting laws of the most penal character by judicial decision—not by Legislative declaration clearly expressed, without which latter sanction, plainly expressed, no penal consequences of any description—much less of the character of those penalties here referred to—can be imposed. Every Act of Parliament should be so construed as to be consistent with common sense and justice, and not so as to do violence to common sense and to work injustice.

"The sensible construction then of the 3rd section of the Act of 1873, which declares the election to be avoided by the corrupt act of the candidate's agent, seems to me to be to confine its operation to such acts as are done by the agent—I do not say within the scope of, but in the course of or exercise of the agency, and in the pursuit of the object of the agency—acts done as specified in the 6th section of the Act of 1868, directly or indirectly by the candidate himself—some act done with a view to promoting in some way the objects of the principal, and not to extend to acts in which the principal is in no way concerned, and which are done not with any view to his interests, or to the object of the agency. Such acts are, it is true, the acts of the person who is agent, but they are not the acts of the agent *qua* agent. In some cases a question may sometimes arise whether or not the act of the agent, which is relied upon as avoiding the election, was done by him *qua* agent, that is to say, in the pursuit of the object of the agency, and with a view to the interests of the principal; in such cases justice will be done, and the purity of election secured, by determining the point in doubt in favour of avoidance, but if, beyond all question, the act complained of is not done in pursuit of the object of the agency, in view of the interest, actual or supposed, of the candidate, or in any way in relation to the election, but solely for the purpose, interest, or gratification of the person who is agent, and is not corrupt otherwise than as it is prohibited and made so by the statute, such an act, not being done by the agent *qua* agent, is not an act which can, in my opinion, be within the meaning of the 3rd section of the Act of 1873.

"I am of opinion, therefore, for all of the above reasons, that the respondent's election cannot be avoided for the treat referred to as given by

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Larkin at Doyle's hotel, although Doyle undoubtedly was guilty of a violation of the 66th section of the Act of 1868, and thereby of a corrupt practice within the meaning of the 1st section of the Act of 1873, and is liable to be made amenable, under that section, to all consequences of having committed a corrupt practice."

The case was argued before the Court of Appeal by

C. Robinson, Q.C., and James Bethune, for the appellant (the respondent to the petition), and

J. A. Miller for the respondent (the petitioner).

DRAPER, C.J.—The only reason given for appeal in this case is as follows:—"That there was not sufficient evidence of corrupt practices having been committed by any agents of respondent, or by the respondent himself, or by and with his actual knowledge and consent, to warrant a judgment voiding the election herein." The judgment was that the respondent was not duly elected—that the election was void "by reason of corrupt practices committed by himself personally, and by reason of other corrupt practices committed by his agents with his knowledge and consent."

In the outset, I must say (speaking for myself only) that I entirely concur in the introductory observations to the judgment delivered, to the effect following: "The difficulty which I have experienced in evolving truth from the greater part of this mass of evidence has been great beyond what can well be conceived, arising from the fact that the manner in which many of the witnesses gave their evidence—who from their intimate connection with the respondent in his business relations, and in the connection with the canvass on his behalf, should reasonably be expected to be able to place matters in a clear light—has left an impression on my mind that their whole object was to suppress the truth."

Apart from the weight to which the opinion of the learned Judge is entitled, he having heard the whole evidence and having had the fullest opportunity to notice the demeanour of each witness—his manner of giving evidence, whether serious and considered or otherwise—and having myself repeatedly gone over it to compare the statements of the witnesses, I feel it my duty to say that I recognise the justice of the censure thus passed upon no inconsiderable portion of the testimony; and severe as the comment undoubtedly is which the learned Judge felt himself called upon to make in regard to the evidence of Mr. John W. King, I see

much reason for thinking that it was not uncalled for. One illustration of the want of correspondence between their verbal resolves and their actions may be given. On the afternoon or evening of Saturday the 16th January (the poll was to take place on Monday following), as one witness stated, "We spoke about spending money, but it was resolved not to. It was the subject of general conversation. Spending money was talked of the same as any other election matter, but there was no way of spending it, the law was so strict." On the Sunday evening (Mr. James Norris is the witness) some parties met at Mr. John W. King's house, at St. Catharines, Mr. King being the bookkeeper and confidential clerk of the respondent. Mr. Norris says: "There was a discussion that evening which could lead to the requirement of money. They spoke, I think, of money being used against them. The party said so. * * * The impression among us was that money was being used against us, and we spoke of using money to counteract it. We decided not to use any money." That same evening, at a late hour, Robert McMaugh and Hugh Hagan left St. Catharines. They drove to Clements', the postmaster, and with him went to several houses. The evidence as to the acts of some one or other of them is quite sufficient as against them to sustain the charge of bribing voters. Whether the evidence, on a consideration of the whole case, will bring the respondent within the scope of sub. 2 of sec. 3, of 36 Vict., c. 2, on the ground of corrupt practice committed by and with his actual knowledge and consent, is a question which will be more conveniently disposed of after other cases have been stated and remarked upon.

[The learned Chief Justice here referred at length to the Clements case, but thought that there was not sufficient evidence that the respondent did, or that King did on respondent's behalf, give or lend, or agree to give or lend, or offer or promise any money or valuable consideration, either to Clements or his wife, to induce him to vote for respondent.]

The case of treating during polling hours in a tavern in the town of Niagara, by giving spirituous liquors which were drank in the tavern, calls for an interpretation of the 66th sec. of the Act of Ontario 32 Vict., cap. 21.

That section is placed in a division of the statute headed "Keeping the peace and good order at elections," and is thus worded: "Every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold,

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shall be closed during the day appointed for polling in the wards and municipalities in which the polls are held; and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of \$100 in every such case."

The law previously in force in the Province of Canada on the same subject was: "Every hotel, tavern and shop in which spirituous liquors are ordinarily sold, shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be on Sunday during divine service, and no spirituous or fermented liquors or drinks shall be sold or given during the said period, under a penalty of \$100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors as aforesaid."

It is, as I understand, contended that the change of language in the latter act, omitting the special limitation of the penalty to "the keeper thereof," makes no difference in the construction, and that the offence which subjects to the penalty can only be committed by the hotel, tavern or shop keeper, under the present statute, which I shall not contend would not be the true construction of the statute of Canada.

It is also, as I learn, further contended that section 66 creates only *one* offence, consisting of two parts, viz.: (1) not keeping the tavern, &c., closed; (2) selling or giving spirituous or fermented liquors to any person. If the latter proposition be correct, it may be that no one but the keeper can incur the penalty; but, confining attention strictly to the language of the section, I think the proposition untenable.

I will first endeavour to meet a suggestion that, unless the section is read as indivisible, the non-observance of the first part will incur no penalty. This appears to me to make the question depend upon punctuation. Put a full stop after the word "closed" and it may be so; but read the whole together, without pause, or even with a comma after "closed," and give legitimate effect to the closing words, "under a penalty of \$100 in *every such case*," and the objection disappears. In every case in which the preceding enactments are violated a penalty is inflicted, as well when the house is not kept closed as when a glass of wine or of spirits or of beer is sold or given.

There is a further reason for construing this section distributively, though the amount of the penalty is the same in all cases. The authority

of *Crepps v. Durden*, Cowp. 640, has never been questioned; it has been frequently recognised, and was the unanimous judgment of the Court of King's Bench, delivered by Lord Mansfield. The point decided was that where a statute imposed a penalty upon a man for exercising his ordinary calling on the Lord's day, he could commit but one offence on the *same* day. As regards the form, it can make no difference that our statute is mandatory, ordering that the house, &c., be kept closed, while in the English act it is prohibitory—"No tradesman or other person shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's day." In Lord Mansfield's language, "The offence is exercising his ordinary calling on the Lord's day, and that, without any fraction of a day, hours or minutes, it is one entire offence, whether longer or shorter in point of duration, and so whether it consist of one or a number of particular acts." In that case the act complained of was exercising his ordinary calling by selling hot rolls of bread. That was the mode in which the ordinary calling was exercised. The selling hot rolls was not prohibited, the exercise of the ordinary calling was. In our case the Legislature have not stopped short at commanding that the tavern should be kept closed, they have also prohibited two other distinct matters—selling and giving liquor, &c. The first is of a character which falls directly within the principle of *Crepps v. Durden*—only one such offence can be committed on the same day; the second, forbidding acts which may be repeated again and again with or to different individuals all day long—and they have imposed the penalty *in every such case*.

It appears to me to follow that the keeper of the hotel, tavern or shop is the only person who can incur a penalty for not keeping the same closed during the day appointed for polling.

The violation of this 66th section is made a corrupt practice by 36 Vict., cap. 2, s. 1, provided such violation occurs "during the hours appointed for polling." The reason for a difference between the 66th section and the 1st section of 36 Vict., cap. 2, is not very obvious; but for some cause penalties are imposed by the one for any violation of its provisions during the day appointed for polling; but to constitute the same violations corrupt practices, they must take place "during the hours appointed for polling." With that exception, the offences remain as defined in the 66th section, and for the purpose of imposing the penalty there is no change. The Legislature, however, appear to have taken a more serious view of these offences

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than they did when the Act of 1838 was passed. There may have been a necessity for some greater punishment than a mere pecuniary penalty to check the undiminished practice of having taverns open on polling days, or of selling liquor or treating on those days, and hence the additional provision in the 38th Victoria.

But for the word "*give*" I might have thought the whole section 66 was confined to the keepers of hotels, taverns and shops. But looking at the object, viz., "Keeping the peace and good order at elections," and the prohibition to *give* as well as to *sell*, I think that would be too narrow a construction; and I am of opinion that any person who during the day appointed for polling shall give any spirituous or fermented liquor or drink to any other person within a hotel, tavern or shop in which such liquors or drinks are ordinarily sold, in the wards or municipalities in which the polls are held, is as guilty of a violation of the section in question as the keeper of such establishment would be who himself should give the liquor. If it was intended to limit sec. 66 to the hotel keepers, &c., by the provision that no spirituous or fermented liquors or drinks shall be sold or given, it would have been much simpler to have said within his hotel, &c., instead of within the limits of such municipality, and simpler still to have said, and no keeper, &c., of any such hotel shall sell or give, &c.

The peculiar form of expression tends to show that the Legislature intended to prescribe one thing, i.e., keeping the hotel, &c., closed; and to forbid another, i.e., selling or giving liquor, and to impose a penalty on every person who neglected to obey the one or who acted in defiance of the other.

As the tavernkeeper, &c., who sells in violation of the statute commits an offence, so the purchaser is equally guilty with the former if he gives the liquor purchased by him to persons in the tavern.

That Larkins was an active agent of respondent is sufficiently proved, and in my view of the law he was guilty of a corrupt practice in treating at Doyle's. The learned Judge, after a very elaborate consideration of the statute and of other authorities which he has referred to in relation to the question, held that the election could not be avoided for this treat, and the petitioner has not appealed against that decision.

The case of W. H. Stewart (the coloured man) remains to be considered. Upwards of two years before the election a pair of respondent's horses ran over Stewart's wife, and one of her legs was broken. She was laid up for eight months

in consequence. At that time Stewart was indebted to the respondent, and the debt was written off in the respondent's mill book. Mr. J. W. King gave this account of the matter: "Mr. Stewart had no legal claim. It was an act of charity to pay him what we did. It is two years since we paid him, whatever it was. It was given as a little present on account of the affliction." And on the 23rd November, 1872, Stewart signed a receipt in presence of J. W. King, as follows: "Received from S. Neelon the sum of fifty-four dollars and sixty-six cents, in full of all accounts or claims whatsoever." About a week before the election now under consideration, the respondent having apparently heard that Stewart or his wife were dissatisfied, sent his salesman, Sistrason, to see her. She told him she was not satisfied—she did not think respondent had done her justice. After the election she came and saw the respondent, and he told her he would give her \$30, and asked if that would satisfy her. Credit was then given for \$19.12 on an account against Stewart, and \$18.88 was paid to her in cash, by respondent's direction. But before this payment, and also about a week before this election, Stewart and the respondent met at the municipal election at the Grantham school-house, and according to Stewart's account, respondent said to him, "I would like to have you with me at the election." Stewart replied he could not very well be with him, because he, respondent, did not give what Stewart thought were the damages due to his wife. That he told respondent he had not done him justice, and that respondent said if he had not done what was right he was able to make it right. Respondent did not say anything about his (Stewart's) vote, but he told more than one time that he would like to have Stewart with him. Daniel Stanley was sitting with Stewart at the time, and says respondent asked Stewart if he was going to do anything for him; that Stewart said "No, sir, I cannot." Respondent asked, "Why?" Stewart said, "You did not do the fair thing when my wife's leg was broken." This is Stanley's account, and he goes on: Mr. Neelon said, "If you will see me in this cause or case, if I have not done the fair thing, I will do the fair thing." Stanley says he heard the conversation distinctly—he could not help hearing it particularly, and did not think there was anything wrong in what was said at the time, and did not think from the language that Mr. Neelon was trying to buy the man's vote. And Robertson, who was standing near, heard respondent say, "Mr. Stewart, I am willing to

do it, and will do it." Stewart says respondent began the conversation by saying, "I would like to have you with me at the election." Then Stewart expressed his dissatisfaction as to the compensation made for the injury to his wife, and respondent said if he had not made it right, he was able to make it right. And he wound up his evidence by saying, "Mr. Neelon said to me, 'Mr. Stewart, I want to do what is right. I am able to do what is right. I can do what is right.' It was not said by way of a bargain. Mr. Neelon only told me he wanted me to support him; he did not make the payment depending on my voting for him." Stewart told his wife what had passed, and she wrote a letter to respondent, beginning, "You sent me word by my husband *about voting, and what I had to say, and if you do what is right, he can use his own pleasure about it.* * * * And now you can use your own pleasure about it, but I think you will do what is right. If you do, give me \$100, and I don't think that will be anything out of the way." This letter is dated January, 1875, no day stated. Stewart says he went to the mill about dusk with the letter, and gave it to a man who attends at the mill. He saw King and Sisterson afterwards, and not hearing anything about the letter, he asked Mr. King if he had seen the letter, and he said he had read it, hung it up, and put it on fyle. He afterwards asked Mr. King, and he said respondent had read the letter and placed it on fyle. Then afterwards he saw respondent, who gave him \$30—not all in cash. He deducted a bill Stewart owed at the mill, and gave the balance in money. Sisterson says that about a week before the election, respondent sent him to see Mrs. Stewart. He told her respondent was still able to do justice—he did not say respondent *would* do justice; he was not authorised to say anything of the kind. Mrs. Stewart told him she would write a letter. It was at her own dictation that she wrote the letter stating what her claim was, and Sisterson said, "That will be just as well."

In reference to this the respondent swears:—

"I gave him (Stewart) to understand I would not give him a cent to go with me in the election. I used no such language as 'If I had not done the fair thing, I will do it if you will be with me,' or anything in substance the same; nor did I say, 'If I had not made it right, I would make it right.' After the election was over, Stewart came to the mill and asked if I had received a letter he had left there. I said no. He went out and made inquiry of King or Sisterson, and they came in with the letter,

which was found in a pigeon hole in my desk. I opened the letter and read it."

Looking at the whole of this evidence, I cannot resist the conclusion that the respondent errs in his representation—(he does not say so in express words)—that he knew nothing of this letter until after the election. He had heard of Mrs. Stewart's dissatisfaction, and before the election he sent Sisterson to her; she told him she would write, and his statement clearly indicates he was present when she dictated the letter; his remark "that will be just as well," clearly indicates that he knew of its contents, makes it at least highly probable that she had expressed her views to him, which, but for the letter, he would have communicated to respondent. Sent for the express purpose of asking Mrs. Stewart "what was the matter with her," Sisterson must, on his return, have given some account to respondent, and if he said what, if his present account be true, he must have said, that she was going to send a letter, it makes it unlikely that the letter, when it arrived, should have been put away in a pigeon hole unopened. King says, in reference to letters for respondent arriving when he was not at the mill—"If he was not at home I opened them. * * He was not absent, only for meetings, and his letters always remained on his desk." Stewart swears that King told him that he had read this letter and put it on fyle, and afterwards told him that respondent had read it and put it on fyle. If King read it, and it seems to have come to his hands upon or soon after its arrival at the mill, I cannot assume that he put it in respondent's desk without mentioning it. On the whole, I deduce as a fact that respondent became aware of it before the election, and thought it as well to leave Stewart to vote without further interference, being satisfied Mrs. Stewart would not influence him adversely.

But in any event the letter shows what impression the conversation with respondent produced at the time on Stewart, and I attach more value to that than to his subsequent assertion, which literally was no doubt true, that respondent did not make the payment depend on his voting for him. Stewart went to his wife, apparently immediately after parting with respondent, and tells her about it, and she writes, or rather dictates, a letter to respondent, beginning, "You sent me word by my husband *about voting, and what I had to say, and if you do what is right he can use his own pleasure about it.*" I cannot doubt, that whatever were the precise words used by respondent, the

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conversation between him and Stewart related to the election and to Stewart's vote, and that Stewart's statement that respondent said to him "I would like to have you with me at the election," is the key-note to all that followed. Stewart understood it, though his vote was not directly mentioned, and the respondent expected it would be so interpreted though so guardedly veiled; and the subsequent settlement and payment confirm me in this conclusion.

I feel therefore constrained to hold this to have been an indirect offer, originating with the respondent, of money or valuable consideration, made to Stewart to induce him to vote for respondent at the coming election, and I therefore agree in the judgment that the election is void by reason of this corrupt practice committed by the respondent himself, as well as by reason of other corrupt practices committed by James S. Clement, Robert McMaugh, Hugh Hagan, and others his agents.

Before concluding, I desire to make an observation as to the proceedings and bribery which are proved to have occurred on the Sunday night before, or in the early morning of the day of the polling.

The professions of a candidate that he is entirely ignorant of the conduct and acts of his most zealous supporters, especially in reference to such acts as are rarely adopted except as a last resort, must unavoidably be regarded with suspicion, and cannot be accepted without scrutiny. And this the more if among these supporters are found some who for years have been and still are in his service, employed and trusted by him in business relations, some of them confidential, and of frequent, perhaps daily occurrence—the candidate, to insure immunity, to all appearance keeping aloof from the consultations of his friends, avoiding any apparent participation in their acts, and thus remaining ignorant of everything which might not become known to the most ordinary observer—ignorant, in fact, because he will not use the means of information which surround him.

Such ignorance brings to mind the old maxim, *Ignorantia juris quod quisque tenetur scire non excusat*, and makes Mr. Best's comment on the maxim more pertinent: "If those only should be amenable to the laws who could be proved acquainted with them * * * the persons would naturally avoid acquiring a knowledge which carried such dangerous consequences with it."

And so the wilful avoidance of a knowledge also fraught with danger might, without much

strain, be deemed evidence of approval or even of consent.

But in this case I do not find any proof of a determination to resort to bribery until a late hour on Sunday evening, and it was immediately acted upon and carried out by an early hour on Monday morning. As a fact, I cannot find proof of the respondent's knowledge or consent. The evidence of agency I think ample, so also of bribery by those agents, and this avoids the election. The shortness of the interval between the resolve and the execution renders improbable the fact of the respondent's actual knowledge, and a finding against him ought to be free from reasonable doubt.

BURTON, J.—I concur in thinking that this appeal must be dismissed, but I desire to base my decision entirely upon the Stewart case.

I agree with the learned Chief Justice, that there is no evidence to connect the respondent with what is spoken of as the Sunday raid. That transaction was conceived and carried out only a few hours before the polling day, and there is not a scintilla of evidence to show that the respondent had knowledge of it, nor, in my opinion, that there was any arrangement to which he was a party, that he should be kept in ignorance of the particular acts of corruption, whilst having a general knowledge that such means were being employed; and adopting the language of the late Mr. Justice Willes: No amount of evidence ought to induce a judicial tribunal to act upon mere suspicion, or to imagine the existence of evidence which might have been given, but which the petitioner has not thought proper to bring forward, and to act upon that evidence, and not upon that which really has been brought forward; and that when circumstantial evidence is relied on, the circumstances to establish the affirmative of a proposition must be all consistent with the affirmative, and that there must be one or more circumstances believed by the tribunal, if you are dealing with a criminal case, inconsistent with any reasonable theory of innocence. There is nothing in the whole of the evidence which is not consistent with the respondent's innocence.

As regards the Stewart case, there was evidence which might impress different minds differently.

In dealing with the finding of the learned Judge upon that evidence, we are much in the position of Judges when a rule is moved for to set aside the verdict of a jury on the ground that the verdict is against evidence. The Judges do not consider what conclusion they would have arrived at had they been placed in

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the position of the jury, but whether there is sufficient evidence to warrant the verdict, and whether the presiding Judge is satisfied with it. Here the learned Judge has found upon the evidence adversely to the respondent, and I should not presume on a question of fact to set up my opinion against his, when he had the advantage of hearing the witnesses, apart from the deference which I feel to be due to a Judge of his learning and experience.

PATTERSON, J.—This is an appeal from the decision of Mr. Justice Gwynne, which set aside the election and disqualified the candidate for corrupt practices committed by him.

The evidence on one of the charges, viz., that of bribing a coloured man named Stewart, is quite sufficient to sustain the finding, and I see no reason for taking a different view of it from that taken by the learned Judge.

The facts stated in evidence were, that Stewart's wife had her leg broken about two years before the election by Mr. Neelon's team, which had run away, and Mr. Neelon had paid her or her husband \$55 as compensation, partly by cancelling an account and partly by cash. It does not appear that after that settlement the Stewarts had had any open account with Mr. Neelon, or had been obtaining goods on credit, until January, 1876. The Stewarts were dissatisfied with the settlement, but nothing was done to remove their dissatisfaction until the approach of the election now in question. This election was on the 18th January, 1876. When the municipal election for the township of Grantham was being held, in the beginning of the same month, Mr. Neelon spoke to Stewart in a school-house where a number of people were, and asked for his support, which Stewart declined to promise, saying that Mr. Neelon had not done the fair thing when his wife's leg was broken, and Mr. Neelon gave him to understand that he was willing to "do the fair thing." Mr. Neelon himself denies that he made any promise to Stewart, although he says that Stewart had put forward his grievance as a reason for not supporting him, both on the occasion in the school-house and on another occasion shortly before that, when Mr. Neelon had been canvassing him for his vote. After going home from the school-house, Stewart appears to have told his wife of the conversation with Mr. Neelon, and some little time afterwards she wrote, or dictated to her daughter, a letter to Mr. Neelon, commencing thus: "Mr. Neelon, you sent me word by my husband about voting, and what I had to say, and if you do what is right he can use his pleasure about it," and ending

by asking \$100 more. Mr. Neelon had asked a Mr. Sisterson, who was his salesman at the mill, and apparently a confidential agent in the election contest, to go to Mrs. Stewart to see "what was the matter with her," and Mr. Sisterson was at her house when this letter was being written, and was told of it by Mrs. Stewart. The letter was promptly sent by Stewart, and delivered to some one at Mr. Neelon's mill or office. Mr. Neelon says the contents of it did not come to his knowledge till after the election. There is quite room on the evidence for a different inference, but the matter is not very important. The letter shows, at all events, the terms on which the Stewarts understood the negotiation to be proceeding. Following Sisterson's visit and the sending of the letter, the facts next in order of time are shown by entries in Mr. Neelon's books, where Stewart is charged, under date 18th Jan., \$4.44 for flour, &c., and on the 16th Jan., \$11.17. The election was on the 18th January. On 10th Feb. Stewart is charged with flour, &c., to the amount of \$3.51, making in all \$19.12. Afterwards, Mr. Neelon himself settled with Stewart, allowing him \$30 additional compensation in respect of the accident, which he paid by giving him in cash the difference between the \$19.12 and the \$30.

The learned Judge having been satisfied, upon evidence of this character, that Mr. Neelon had directly or indirectly, by himself or by some other person, given, offered, or promised money or valuable consideration to Stewart in order to induce him to vote, it is impossible for us to say that he ought to have come to any other conclusion.

This disposes of the appeal without the necessity of discussing the other matters covered by the very careful and elaborate judgment of the learned Judge. One of these subjects, viz., the construction of section 66 of the Act of 1866, and the effect of the Act of 1873, when that section has been violated with the knowledge and consent of the candidate, we have already had occasion to notice in the judgment of this court in the *North Wentworth* case. And we have further to construe section 66 in the *South Ontario* case, in which judgment is now to be delivered.

With respect to the charge founded on what is spoken of as the "Sunday raid," I shall merely say that I am not prepared to assent to the application to that case of the principle on which the *London Election* case was decided, or to hold that on that principle alone the candidate is to be fixed with knowledge of the bribery committed by his agents, however gross and delib-

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erate that bribery may have been, and however strong may be the suspicion created in our minds that the candidate can hardly have been quite ignorant of what was being done on his behalf. I entirely assent to the distinction which was clearly pointed out by Mr. Robinson in the very able argument which he addressed to us, between the case of a city where, within a comparatively small area and for the space of two or three weeks, bribery had been going on so extensive and so flagrant as to be appropriately described as pervading the atmosphere; where not to ascribe knowledge of it to the candidate in whose interest it was committed, and who was on the spot, would be to forego experience and give no weight to probabilities so strong as to be almost irresistible; and where, in the graphic language of the same learned Judge whose judgment is now on review, one could "as readily believe it possible for the respondent to have been immersed in the lake and to be taken out dry, as that the acts of bribery which the evidence discloses to have been committed on his behalf, almost under his eyes, in his daily path, with means of corruption proceeding from his own head-quarters and from the hands of his confidential agents there, could have been committed otherwise than with his knowledge and consent," and the present case, where what was done was done only a few hours before the election, and though initiated in the town where the candidate lived and by agents who were in his confidence, was carried out at a place several miles away, and amongst the voters in one locality only of a county constituency.

I agree that the appeal should be dismissed with costs.

Moss, J., concurred.

Appeal dismissed with costs.

CHANCERY CHAMBERS.

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Solicitor—Payment of money to Solicitor.

The retainer of an attorney or solicitor to collect a demand, and to take such proceedings as he may deem proper to effect this object, gives him authority to receive the amount before or after suit, and to discharge effectually the party making the payment, unless the client restricts or terminates the authority given to his attorney or solicitor.

[January, 1876—BLAKE, V.C.]

Proceedings in this suit were commenced for the purpose of recovering against the estate represented by the defendant damages for breach of a covenant entered into by one Solomon

White. On the 15th of March, 1873, by a consent decree it was declared that the plaintiff was entitled to be paid, by way of damages for the breach of this covenant, the sum of \$830, and it was ordered that the defendant should, within one month from the date of the decree, pay to the defendant the sum of \$330 and the costs, and in default of such payment that the estate of Solomon White should be administered. On the 16th of April, 1873, the defendant paid the solicitor of the plaintiff \$760, and on the 3rd of May following the sum of \$200, and on the 6th of August of the same year he tendered the plaintiff \$195.33 as the balance due. The solicitor for the plaintiff absconded without paying over the \$900 paid to him.

On the allegation that the payment to the solicitor was not a good payment, a motion was now made by the plaintiff under the liberty reserved in the decree, for the administration of the estate in question. The plaintiff had employed one Foster, his father-in-law, to look after the suit for him, and the defendant, in resisting the motion, put in affidavits to show that Foster was told of the first payment at least to the solicitor, and neither he nor the plaintiff made any objection.

Hoyle for the plaintiff.

J. A. Boyd for the defendant.

BLAKE, V.C. There is no doubt that no instructions were given to the defendant not to pay the money to the plaintiff's solicitor, nor to this solicitor not to receive the amount found due. I think the proper conclusion from the evidence is that the plaintiff intended that his solicitor should receive the money for him whenever the defendant paid it. Charles McVittie, clerk of the plaintiff's solicitor, says, that at the date of the first payment he told the plaintiff the amount had been received, and that the defendant had promised to pay the balance shortly; that Foster and the plaintiff's wife were also told of this payment. He says they expected the money would be paid to Whitley (the absconding solicitor). Foster says he understood the defendant was to pay the money into Whitley's office, and he heard that some of the money had been paid to Whitley, who would not settle until all the money was paid over.

I do not think there can be any doubt that, when a client instructs an attorney or solicitor to collect a demand he may have, he thereby empowers him to receive from the defendant payment of that which is handed over as a satisfaction of the claim, and that such payment is a good discharge to the debtor or defendant. By his employment he appoints him his agent to

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demand satisfaction in respect of the claim of his client; to take proceedings in case the demand be refused; to compromise if thought proper, and to receive the result of the litigation; and, as a consequence, effectually to discharge the person making the payment. In this respect I can find no difference between the position of an attorney and solicitor.

Mr. Pulling says, p. 104: "The attorney for the plaintiff in an action is the proper person to whom payment or tender of the debt, or damages or costs, should be made. And the attorney on the record is deemed the proper hand to receive the fruits of the execution, and to enter satisfaction after payment; and by his general authority in the action he may remit the damages, or, as it is said, acknowledge satisfaction, though nothing is paid." I think Mr. Pulling is incorrect in the last statement he makes. In Archbold's Practice (vol. i., p. 87, 12th ed.) it is said, in speaking of the power of an attorney, "If he is authorised to do a particular act, he may do everything that is necessary for the accomplishment of it. Where a party is sued for a debt, payment or tender of it to the plaintiff's attorney is the same as payment or tender to the plaintiff himself, and the attorney's receipt binds the client." This rule seems to date back for many years. In *Morton's case*, 2 Shower, case No. 115, p. 140, it is said: "Suppose that the sheriff die or become insolvent, the plaintiff must not lose his debt; otherwise, if the money had been paid to the plaintiff's attorney upon record, for that would have been a payment to the plaintiff himself." Some years after that we find the very strong case of *Powell v. Little* 1 W. Bl., 8, "The plaintiff had privately countermanded his attorney in this cause. The defendant afterwards pays him the debt in dispute for the use of the plaintiff, and the Court held it a good payment, because the attorney was changed without leave obtained from the Court."

In *Crozer v. Pilling*, 4 B. & Cr., 28, *Morton's case* is approved of. "F. Pollock now moved for a new trial. First, he contended that the debt and costs ought to have been paid or tendered to the plaintiff, and not to his attorney upon the record. [Upon this point the Court intimated a clear opinion that the attorney upon the record was the proper person to receive payment of the debt and costs, and that the tender was properly made to him.]" Bayley, J., says, "In *Morton's case* it is laid down by the Court that a defendant is not bound to pay money to the sheriff, but to the party, and it was said that it was sufficient if the money was paid to the plaintiff's attorney upon the record, for that

would have been a payment to the plaintiff himself." In *Savory v. Chapman*, 11 Ad. & El. 832, Littledale, J., says: "The authority of an attorney in general is determined after judgment, but he may still sue out execution and receive the money, and his receipt is then the same as that of the principal; and according to 1 Roll. Ab., 291, tit. Attorney (M.), cited in Com. Dig. Attorney (B. 10) he may, after payment, acknowledge satisfaction on the record."

In *Mason v. Whitehouse*, 4 Bing. N. C., 692, it was held that "a demand by the attorney of the party, without an express power of attorney, was sufficient," and an attachment issued for the non-payment of the sum thus demanded was allowed to stand. The judgment of the Court in *Bovins v. Hulme*, 15 M. & W. 88 seems conclusive as to the authority of the attorney.

The Court there says: "We agree that the original retainer is to be presumed, *prima facie*, to continue as long as by law it might, as argued by Mr. Pridcaux on the authority of Lord Ellenborough's *dictum* in *Brackbury v. Pell*, 12 East 588; although we think he was right in contending that the original retainer was not determined by the judgment, but continued afterwards, so as to warrant the attorney in issuing execution within a year and a day or afterwards, in continuation of a former writ of execution issued within that time, and also to warrant his receiving the damages without a writ of execution, the weight of prior authorities being against the decision of Heath, J., in *Tipping v. Johnson*," 2 B. & P., 257. It is to be observed that the Common Law Courts, while thus laying down the law as to the power of an attorney, do not differ at all from the practice found in Courts of Equity, as to the power of a solicitor to bind his client by a receipt of mortgage money. This is shown in the case of *Sims v. Bruton*, 5 Ex. 802, decided by the Court of Exchequer, which agrees with the decision of Lord Hatherley, in the case *Withington v. Tate*, L. R., 4 Chy. 288. Upon the facts found in this case it cannot be taken that it was any part of the business of the defendants as solicitors to receive repayment of the mortgage money, and lay it out again at interest. For that purpose there must be some authority, either express or applied. *Wilkinson v. Candlish*, 5 Ex. 91, decided that a solicitor has no authority, from the mere possession of the mortgage deed, to receive either principle or interest."

In *Brouillon v. Roche*, 27 L. J., Chy. 681, the present Lord Hatherley considered the position of a solicitor as to the receipt of money on behalf of his client; and after reviewing the authorities, placed the matter upon an intelli-

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MOODY v. TYRRELL—RE BAZELEY—KENNEDY v. BROWN.

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gent footing. He quotes with approval the language of Lord Justice Turner in *Viney v. Chaplin*, 27 L. J. Chy. 434: "I take it to be settled that a solicitor is not by virtue of his office entitled to receive purchase moneys, even although he may have possession of the deed of conveyance; and it would be strange if he were, for it is no part of the ordinary duty of a solicitor to receive money belonging to his client, and the deed of conveyance comes into his hands for a wholly different purpose;" again he approves of this language, "that it was no part of the ordinary business of a solicitor to receive purchase money, and he could not fix Plowman with the consequences of Roche's receipt, being unable to draw any distinction between purchase money and money due on mortgage." So that the power to receive money appears to rest on the object for which the attorney or solicitor was retained.

I think it is clear that when an attorney or solicitor is retained to collect a demand, and to take such proceedings as he may deem proper to effect this object, that it embraces the right to receive the amount from the defendant before or after suit, unless or until the plaintiff restricts or terminates the authority given to his solicitor; that by this employment the solicitor is appointed the agent of the plaintiff to demand and receive the claim, and to discharge effectually the party making the payment. This right does not allow the attorney or solicitor to receive money of the client because he may happen to have deeds, mortgages, or other papers in his hands belonging to him, unless the client instructs the solicitor to receive the money which may be paid him. It does not follow from this conclusion that a person ordered to pay money into court is effectually discharged by paying it to a solicitor; nor that money once paid into court can be paid out otherwise than personally to the party entitled to receive it, or to his agent duly appointed under a power of attorney. In the first case the Court requires an exact fulfilment of the terms of its decree, and in the latter it sees that the money goes directly to the hand entitled to receive it. In some cases the Court in England appears willing to relax somewhat this rule: *Ex p. De Beaumont*, 13 Jur. 354; *Waddilove v. Taylor*, 13 Jur. 1023; *Mansfield v. Green*, 1 W. N. 220.

In the present case the solicitor was retained by the plaintiff to collect from the defendant the demand, the subject of the suit. The solicitor was bound to take steps that would lead to this result, and was entitled at any time to receive from the defendant that which he was employed to collect. This power was never withdrawn,

and, in the exercise of it, he received \$900 of the claim, and to that extent he effectually discharged the defendant. The plaintiff cannot therefore collect this from the person who has paid it; and as these proceedings are taken to endeavour to effect this object, the application must be dismissed with costs.

RE BAZELEY.

Infants—Application of property for maintenance—29 Vict., cap. 17, and 33 Vict., cap. 21, sec. 3.

33 Vict., cap. 21, s. 3 (O), only authorises the application of the interest on insurance moneys, apportioned to infants under 29 Vict., cap. 17, for the maintenance of the infants. The principal can, under these acts, only be applied for advancement, but under the general jurisdiction of the Court may be applied for maintenance.

[February 7, 1876—PROUDFOOT, V.C.]

The deceased father of the infants had insured his life under 29 Vict., cap. 17, for the benefit of his wife and children. The amount apportioned to the children was \$1,000, and was held by a trustee for them. It was shown that the income had already been anticipated to the extent of \$100, and that the necessities of the children required payment of a portion of the principal.

Foss now applied on behalf of the children for an order authorising the application of a portion of the principal for the maintenance of the infants.

PROUDFOOT, V.C.—I do not think that I could give any direction involving the application of the principal for maintenance if the case depended on 33 Vict., cap. 21, s. 3. That act only authorises the application of the interest for maintenance. The principal may be applied for advancement.

But the petitioner may amend his petition, asking relief under the general jurisdiction of the Court, and when that is done an order will be made.

Under the circumstances of this matter I think it would be a proper direction to sanction the application of \$100 for the immediate necessities of the children, and application may be made again if the necessity continue. The costs of this application to be paid out of the funds.

MASTER'S OFFICE.

KENNEDY v. BROWN.

Costs—Higher or lower scale.—Subject matter involved in the suit.

A bill was filed for the specific performance of a contract for sale of land, for a sum less than \$150. Before suit the plaintiff, the vendee, had entered

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upon the land and made improvements upon it, which increased its value to more than \$300.

Held, that the "subject matter involved" in the suit was more than \$200, and that the plaintiff was therefore entitled to costs according to the higher scale.

[February 15, 1876—TAYLOR, Master.]

The bill in this suit was for specific performance of an agreement, whereby defendant agreed to sell to plaintiff a certain parcel of land for less than \$150. After the agreement, and before bill was filed, plaintiff entered upon the land and erected a house upon it, which increased the value of the land to more than \$200. Decree was for specific performance, and contained a reference to the Master, to inquire how much was due to defendant, and directed defendant to pay to the plaintiff his costs of suit. The Master found that the amount due was less than \$200.

Hoyle, for defendant, contended that under the above circumstances plaintiff was only entitled to costs upon the lower scale.

J. S. Ewart, for plaintiff, contended that the value of the land, together with the building, was the test.

TAYLOR, M.—The plaintiff seems entitled to have his costs taxed upon the higher scale. What is "the subject matter involved?" The land as it stood at the date of filing the bill. It is true that the purchase money, agreed to be paid for it, when bought some years before, was less than \$200; but in the meantime improvements have been made, and the value of these added to the land, make it of greater value than the \$200. These are all involved in the present suit.

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IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

QUEEN'S BENCH.

HILARY TERM, 1876.

STUBBS V. JOHNSTON.

(March 17.)

Contract—Construction.

Action on agreement, whereby plaintiff agreed to cut, &c., a certain number of standard logs on 1,800 acres of land mentioned in a schedule to the agreement, for specified prices, which agreement, after other provision as to building roads, etc, concluded, "the defendants to provide the pine timber which is to be cut on the

lots mentioned," &c. Breach, that the defendants did not provide the pine logs or make roads, &c. Second count for money payable for logs cut, &c.

Held, that under the terms of the contract the defendants were not bound to point out the trees to be cut on the land; that the word "provide" applied to the lots of land.

The jury having found that the plaintiff was overpaid \$100 for the trees actually cut, and \$10 in his favour as damages for breach of contract in defendants not building certain roads, and a verdict having been entered *ad nisi prius* for the defendants, *held*, also, that the plaintiff was entitled to a verdict of \$10 on the count for the breach.

J. K. Kerr for plaintiff.

Oster for defendants.

SPOONER ET AL. V. WESTERN ASSURANCE CO.
(March 17.)

Marine Insurance—Average—Deck-load.

Special case. Plaintiffs owned the vessel "Canadian," insured with defendants against perils of navigation, the policy containing no exceptions as to deck-loads. On the 19th September, 1873, the plaintiffs' agent undertook to carry a full hold and deck-load of coal from C. to T.; the bill of lading contained the words "*all property on deck at the risk of the vessel and owners.*" The vessel went ashore on the voyage between C. and T., and was got off by a tug after the deck load was thrown overboard. The case stated that the usage of vessels on this route was to carry deck loads, and that the jettison of the deck-load was made to save the vessel and the rest of the cargo. A statement of general average having been made, the plaintiffs insisted that defendants must contribute.

Held, though with some doubt, that under the special terms of the bill of lading, quoted in italics, the defendants were not liable; but for these terms, the decision might have been otherwise.

Remarks on the propriety of placing such a contract beyond doubt by clear and unambiguous language.

McMichael for plaintiff.

Bethune for defendant.

ÆTNA INSURANCE COMPANY V. GREEN.

(March 17.)

Insurance—Agent—Payment.

One B., plaintiffs' agent, effected an insurance on the life of defendant, who was in charge of a branch of the City Bank. B. had overdrawn his account at this branch, and when defendant

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was about to pay the first premium on the policy, B. asked him to deposit it to his (B.'s) credit. Defendant accordingly drew a cheque on another branch where he had funds, and the amount was transferred to B.'s credit. B. at the time handed the policy to defendant duly executed. B. not having paid plaintiffs this sum,

Held, in any action to recover it from the defendant, that the transaction amounted to a payment to plaintiffs.

Scnble, also, that the acceptance of the policy and the other facts raised a promise to pay the premium.

Hagel for plaintiffs.

M. C. Cameron, Q.C., for defendant.

VACATION COURT.

DEVLIN V. HAMILTON AND LAKE ERIE RAILWAY COMPANY.

(April 25, 1876.)

R.W. Co.—Mandamus to assess damages—Structural damage.

Defendant's road is brought into the city of H. through C. Street, a very narrow street, with the leave of the municipality. Plaintiff had one brick and two rough-cast houses on the street, and the trains caused the houses to vibrate and plaster to fall, and were a serious inconvenience to the user of the houses.

HAGARTY, C.J., C.P., on an application to assess damages, *held*, that no such peculiar structural injury is shown as would entitle plaintiff to relief, and, apart from structural injury, no relief could be granted.

J. B. Read for applicant.

C. Robinson contra.

RE ARKELL AND CORPORATION OF ST. THOMAS.

(April 23, 1876.)

Limiting licenses to one—Billiard tables—Hours for closing.

Held, following *In re Brodie and Bowmanville*, that a by-law limiting shop licenses to one is *ultra vires*.

HAGARTY, C.J., C.P., *held*, that the corporation have power to declare that no billiard table kept for hire shall be allowed in any licensed tavern.

Held also, under the power given by sec. 12 of the last Tavern and Shop License Act, as to shops, that the municipality "may impose any restrictions upon the mode of carrying on such traffic as the Council may think fit," the Council may require shops to sell between the hours of 7 A.M. and 7 P.M. only.

Robinson, Q.C., for applicant.

F. Osler contra.

RE DONELLY AND TOWNSHIP OF CLARKE.

(April 23, 1876.)

Liquor licenses—Different duties in same municipality.

The council of a township passed a by-law fixing the duties to be paid for licenses for taverns and shops in several villages in the township at one sum, and in the rest of the township at a lower sum.

HAGARTY, C.J., C.P., *held*, that the distinction was unwarranted and contrary to the spirit of sec. 224 of 36 Vict., cap. 48.

Hutcheson for applicant.

RE WYCOTT AND TOWNSHIP OF ERNESTOWN.

(May 5, 1876.)

Dunkin Act by-law—Defective publication—Power to quash.

In publishing the requisition and notice for a by-law under the Dunkin Act, there was no publication at all during one of the "four consecutive weeks" before the day fixed for the poll, as required by sec. 5 of the act. The by-law was carried by a large majority, and there was no allegation on the part of the applicant that any voters were misled by want of the notice.

HARRISON, C.J., *held*, that granting the Court might in its discretion quash the by-law, it was not, under the circumstances, a proper case for the exercise of that discretion. *Cox v. Pickering*, 24 U.C.Q.B. 441, and *Miles v. Richmond*, 25 U.C.Q.B. 333, distinguished.

The rule was discharged without costs, as the corporation did not see fit to appear.

F. Osler for applicant.

RE MCLEOD AND TOWN OF KINCARDINE.

(May 9, 1876.)

Harbour dues—By-law to raise—Duties on merchandise.

The town of Kincardine passed a by-law, sec. 1 of which made all goods, wares, merchandise, coming into or going out of the harbour, chargeable in the hands of consignees, with certain scheduled duties for the purposes of the harbour. Sec. 2 gave the harbour officer power to seize and sell the goods for these duties. Sec. 3 gave an action for the dues; and sec. 4 provided for punishing any one evading payment of the duties. Sec. 6 provided imprisonment for 30 days, for any one who fouled, injured, or incumbered the harbour piers, &c.

HARRISON, C.J., *held*, that sections 1 to 4 were clearly *ultra vires* of the corporation, as the duties must be imposed on the vessels.

Held also, that so much of sec. 6 as imposed imprisonment for 30 days must also be quashed.

F. Osler for applicant.

McMichael, Q.C., contra.

COMMON PLEAS.

MICHAELMAS TERM, 1875.

ROBERT CAMPBELL ET UX. V. JAMES CAMPBELL.
(December 12, 1875.)

Slander—Adultery of wife—Special damage—Damages—Arrest of judgment—Evidence—Effect of judgments in crim. con. and suit for alimony.

In a declaration by a husband and wife, for the slander of the wife in accusing her of adultery, it was alleged as special damage that the wife had lost and been deprived of the hospitality of friends with whom she was in the habit of associating, and who now refused to associate with her.

Held, on a motion for arrest of judgment, a sufficient allegation of special damage to support the action.

Quære, whether the allegation of the loss of the consortium of the husband would have been alone sufficient.

Held also, that the declaration claiming the damages as the wife's, although when recovered they might belong to the husband, was no objection, and, at all events, merely a matter of form and so amendable.

Held also, that the course adopted by the husband at the trial, with the defendant's concurrence, in conceding the action to be, in substance, that of the wife alone, and coming forward as a witness for the defence in support of a plea of justification, and allowing the case to be submitted to the jury on the question of the truth or falsity of the accusation, would now preclude the motion in arrest of judgment.

The husband had sued the person accused of the adultery, for charging which this action was brought, and recovered a judgment against him in an action of crim. con., and judgment had been given in Chancery against the wife, on the ground of adultery, in a suit brought by her against the husband for alimony.

Held, that under these circumstances the verdict entered for the plaintiff must be set aside, when the plaintiff, Robert Campbell, if so advised might raise the question whether he was not *dominus litis*.

M. C. Cameron, Q.C., for plaintiff.

Harrison, Q.C., for defendant.

DAVIES V. APPLETON ET AL.

(December 18, 1875.)

Contract—Not to be performed in the year—Statute of Frauds—Agreement—Construction of—Right to terminate.

The plaintiff entered into a verbal agreement with the defendant to canvass Canada for sub-

scribers to a certain book, and on completing Canada to go to Liverpool and canvass for subscribers in England, the plaintiff to be paid \$3 for each subscriber he should obtain in Canada, and \$8 in England. In an action for terminating this agreement it was stated by the plaintiff in his evidence that the agreement as to Canada and England was all one, and that it would take from eight to twelve months to complete Canada and over two years to do this work in England.

Held, a contract not to be performed within a year, that being the intention of the parties and apparent from the nature of the employment, that the plaintiff therefore could not recover.

Held also, that the agreement was only to pay the plaintiff for every subscriber he should obtain, neither party having the right to terminate the engagement, and the only claim the plaintiff could have against the defendant was for subscribers obtained before his dismissal, which the evidence here shewed that the plaintiff had been paid for.

M. C. Cameron, Q.C., and *R. P. Stephens* for plaintiff.

Lash for defendants.

MILLER V. THE GRAND TRUNK RAILWAY CO.

(December 18, 1875.)

R.W. Co.—Approaching highway crossings—Neglect to give signals—Liability—Misdirection.

Persons approaching and passing over level railway crossings are bound to exercise their ordinary powers of observation, and the omission to ring the bell or sound the whistle, as directed by the statute, in no way releases them from the exercise of such care.

In this case there was evidence that the morning, when the accident happened, was rather wild and blustering, with snow blowing in the plaintiff's face. The plaintiff swore that he approached the crossing on a walk, and looked both ways along the track, but saw nothing until the engine was close upon him. He then whipped up his horses, but the engine struck the sleigh, and killed one of them. Defendants' witnesses, on the other hand, said that the plaintiff could not have failed to have seen the train approaching had he looked. It was clear that the bell was not rung as directed nor the whistle sounded.

The jury were told that they must be satisfied that the plaintiff in crossing took all the precautions which a prudent man would have taken; and that if he did, taking into consideration the weather, the manner of approaching the cross-

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ing, &c., and notwithstanding this the accident happened, and the defendant's servants did not ring the bell at all, or did not ring it so that the plaintiff could hear it, or until the crossing was passed, the plaintiff was entitled to recover.

Held, a proper direction, and a verdict for the plaintiff was upheld.

The views expressed in *Johnston v. Northern Railway Co.*, 34 U.C.Q.B. 482, considered and affirmed.

Robinson, Q.C., for plaintiff.

McMichael, Q.C., for defendants.

DARRACH QUI TAM V. PATTERSON.

(January 8, 1876.)

Justice of the Peace—Neglect to return convictions—Several penalties.

Held, that the neglect of a justice of the peace to return convictions made by him, as prescribed, renders him liable to a separate penalty for each conviction not returned, and not to one penalty for not making a general return of such convictions.

The various statutes on the subject reviewed.

An application made at the trial and reserved till term to add a plea of a former judgment recovered for the non-return of the same convictions herein, was disallowed, there being no affidavit of *bond fides*, and the judgment appearing collusive.

J. Creaser for plaintiff.

Robinson, Q.C., for defendant.

ADAMS V. CORCORAN.

(January 8, 1876.)

Trover—Married woman—Devise of personal property.

In an action of trover against defendant for the conversion of certain personal property bequeathed by testatrix, a married woman, to plaintiff in trust for her children, and appointing him executor, the defendant claimed the property by gift *inter vivos* from testatrix, and on such gift being disproved, defendant amongst other objections objected to the validity of the will, on the ground of the absence of the husband's consent; but there was no plea on the record denying plaintiff's status as executor, nor did defendant defend under the husband's right.

Held, under these circumstances it was not open to defendant to raise the objection.

R. Smith (Stratford) for plaintiff.

J. K. Kerr for defendant.

VACATION COURT.

STEEN ET UX. V. SWALWELL.

(October 19, 1875.)

Bond—Failure of consideration—Equitable defence.

To an action on a bond whereby the defendant became bound to pay to the plaintiffs \$400 as soon as the patent to certain land should issue, and in case one W. G. should make default in the payment of the said sum, the defendant pleaded, on equitable grounds, that the only consideration for the bond, though not stated in it, was that W. G., being the purchaser of the said land, and having paid part of the purchase money, the receipt, through some mistake, was made as if the payment had been made jointly by W. G. and one J. G., the then husband of the female plaintiff, whose name became inserted in the Crown Lands Office in connection with the lot, creating a difficulty which for some time prevented W. G. obtaining the patent, that J. G. having subsequently died and the female plaintiff having intermarried with the co-plaintiff, the plaintiffs agreed that if the defendant would execute the bond, neither they nor J. G.'s children would do anything to prevent, but would do all in their power to assist, the issue of the patent to W. G.; but that nevertheless the plaintiffs and the children opposed the issuing to W. G., both before the Court of Chancery and before the heir and devisee commission, whereby the defendant became discharged from his obligation.

WILSON, J., held, a good defence in equity, for it shewed that the plaintiff's conduct was the cause of the defendant's non-performance, and that there was a total failure of consideration; and although the alleged consideration was not stated in the bond, it was in no way inconsistent with or repugnant to it, and if so stated would have been a good defence at law.

O'Brien for plaintiffs.

McMichael, Q.C., for defendant.

HALDAN V. SMITH.

(October 22, 1875.)

Administrator pendente lite—Right to sue without authority of Court—Pleading—C.S.U.C., cap. 16, sec. 54.

Declaration on the common counts by plaintiff as administrator for one W. The defendant pleaded that a suit was and is pending in the Court of Chancery concerning the validity of W.'s will, and that, in such suit, the Court of Chancery did appoint the plaintiff, during the pendency of said suit, to be administrator of W., in pursuance of the statute in that behalf subject to the control of said Court, and

ordering the plaintiff, as administrator, to act under the directions of said Court; and defendant averred that the plaintiff never obtained the authority or direction of the Court to bring his suit; and that save as aforesaid, the plaintiff is not the administrator of W.'s estate and effects. To this the plaintiff replied that in two suits named, pending in Chancery, the plaintiff was appointed by the Court administrator pending these suits, with all the powers of a general administrator, under which authority he now brings this action.

WILSON, J., *held*, on demurrer to the replication, that as it appeared from the pleadings that the plaintiff was not a general administrator, but only *pendente lite*, the declaration should have alleged his authority to be so limited, and that the suits during whose pendency the plaintiff was administrator was still pending, and in this respect the declaration was bad, and that part of the plea traversing the plaintiff being a general administrator was good.

2. That the plaintiff having, under C.S.U.C. cap. 16, sec. 54, all the rights of a general administrator, might sue without the prior leave, and that that portion of the plea alleging the want of such leave was therefore no defence.

3. That the replication, in alleging that the plaintiff was a general administrator during the pendency of the suits, was bad.

Donovan for plaintiff.

Foy for defendant.

SPENCER V. CONLEY—DOOLEY, GARNISHEE.

(April 21, 1876.)

Garnishee order—Rival claimants to debt.

On an application under the C.L.P. Act, for a garnishee order for a debt alleged to be due by the garnishee to the judgment debtor, the debt was claimed by a third person, and on such ground the garnishee disputed his liability to pay it to the judgment debtor. The Judge to whom the application was made, under these circumstances, directed a writ to issue under sec. 291.

On a motion, in this court, by the garnishee, to set aside this writ, HARRISON, C.J., *held*, that in the absence of any power in the Judge to direct an interpleader issue, or summon such third party before the Court, the course adopted by him was the proper one, but that if the garnishee wished to avoid the responsibility of deciding between the rival claimants, he might file a bill in equity calling upon the parties to interplead.

Remarks as to the absence in the act of pro-

visions similar to these contained in secs. 28-30 of the English C.L.P. Act, 23-24 Vict., cap. 125.

J. K. Kerr, Q.C., for judgment creditor.

F. Osler for garnishee.

KILROY V. SIMPKINS.

(May 2, 1876.)

Promissory Note—Agreement—Failure of consideration—Tender—Pleading.

To an action on a promissory note for \$498, made by the defendant to the plaintiff, the defendant pleaded on equitable grounds that by an agreement made between the parties, a partnership which had existed between them was dissolved, the defendant to give the plaintiff the promissory note in question, and to pay certain debts and liabilities of the firm, and in consideration therefor to become the sole owner of certain property of the firm, and to have assigned to him by the plaintiff all the plaintiff's interest in certain debts and accounts due the firm, as well as certain debts due the plaintiff personally: that the defendant had performed his part of the agreement by giving the note and paying such debts and liabilities, but that the plaintiff, although requested to do so, had neglected to perform his part of the agreement by giving the defendant such a power of attorney or assignment as would enable him to sue for the said debts and accounts, whereby he was prevented from obtaining payment of the same; and that, except as aforesaid, there was no consideration for the making of the said note: and that such debts and accounts are equal to the plaintiff's claim on the said note.

HARRISON, C.J., *held* the plea bad, both at law and in equity, as only shewing a partial failure of consideration; and that defendant's remedy was by cross action.

Semble, that the plea was also bad for not averring a tender to the plaintiff for execution of the required power of attorney or assignment.

It was urged by the defendant that as the plea did not aver that the agreement for the dissolution was in writing, it must be assumed not to be so, and so in equity an account would have to be taken, and on this ground the plea was supportable.

Held, that this contention could not prevail, for that even if such an averment were necessary, the defendant could not take advantage of a defect in his own pleading; but that there was no necessity for such an averment, the distinction in this respect between the declaration and the subsequent pleadings being now abolished,

the Court presuming a writing where one is required.

McMichael, Q.C., for plaintiff.

Bethune, Q.C., for defendant.

CHANCERY.

HERON V. MOFFATT.

(April 3, 1876.)

Trustee and cestui que trust—Purchase by trustee.

After the judgment, as reported in 22 Gr. 370, where the facts sufficiently appear, the plaintiffs proceeded to a hearing at the last examination term in Toronto, before the Chancellor, and there gave evidence that Moffatt had, at the auction sale there spoken of, offered some property of his own for sale by auction, and had the same person (Barclay) employed as his agent to bid for that lot as well as for the property held in trust; and that Barclay did accordingly bid, and the property was knocked down to him; when the auctioneer called upon him to sign the sale-book, and he (Barclay) then explained that his bidding was as Moffatt's agent only, and therefore the auctioneer did not press Barclay to sign, considering, as he stated, both properties bought in. It was contended for the plaintiffs that the case now was distinguishable from that presented on the motion for injunction, and that Moffatt was bound to complete the contract, which was valid by reason of Barclay's name being entered in the book as agent for Moffatt.

SPRAGGE, C., said that no doubt he would be bound if he bid with the intention of becoming a purchaser, but it is quite clear that he had no intention of becoming a purchaser; and if he had not, the bidding was in order only to get a good price. It may have been irregular or even improper, but Barclay's agency, taking it to be ever so strongly established, cannot be more binding upon him than if he had bid himself. The judgment already delivered is clear upon these points: "The cases establish that if a trustee for sale buy in the property, intending to become the purchaser, the *cestui que trust* has the option of holding him to his bargain: *Campbell v. Walker*, 16 Gr. 526.

And it seems also that assignees in bankruptcy cannot buy in the property for the benefit of the estate, unless having authority from the creditors,—and if they do so, they may be held to their purchases. "In the class of cases, however, represented by *Campbell v. Walker*, the trustee bid with the intention of purchasing for himself. In the bankruptcy cases it has to be noticed that the assignee had no discretion, no

authority to interfere with the sale; his duty was to carry out the instructions of the creditors. In this case, however, the trustee was authorised, in his sole and independent discretion, to sell either at public auction or private contract for cash or on credit at fair reasonable prices, and to re-sell. So that Moffatt was the person who was to exercise the discretion that in bankruptcy is vested in the creditors. It is the duty of a trustee for sale to take reasonable precaution to protect the property, to prevent its being disposed of at an undervalue."

Upon the question of Moffatt being disallowed the moneys expended by him for insuring the buildings, the subject of the trust, his Lordship remarked that he entirely agreed with V.C. Prondfoot, that "the question depends on whether Moffatt was a trustee or only a mortgagee; and considering the duties imposed on him by the agreement, I have no difficulty in determining him to be a trustee. And a trustee is entitled to insure, and charge the premium against the estate." The plaintiffs, however, are entitled to an account.

The usual reference reserving further directions and subsequent costs was made.

J. A. Boyd for plaintiffs.

Crooks, Q.C., and *Boulton* for defendants.

THE GRAND JUNCTION RAILWAY COMPANY V. BICKFORD.

(March 24, 1876.)

Railway Company—Delivery of railway iron.

This was a suit to restrain the defendants, Bickford & Cameron, and the Bank of Montreal, from removing a quantity of railroad iron, alleged to have been delivered by Bickford & Cameron to the defendant Brooks, who had entered into a contract with the plaintiffs for the construction of their road, under a contract to do so made with Brooks. It appeared that under an agreement executed in June, 1874, between Brooks and Bickford & Cameron, the latter had agreed to furnish Brooks with 4,000 tons of rails at \$47 a ton, on a credit of six months from the several deliveries of the iron, the periods for which were set forth in the agreement, Brooks, amongst other securities, agreeing to execute an irrevocable power of attorney in favour of the Bank of Montreal, to receive the Government and certain municipal bonuses mentioned in the bill—"the vendors to hold their lien and ownership on the iron till laid down on the track, when the several grants and bonuses are payable"—and agreeing also to procure from the plaintiffs a mortgage for a sufficient sum,

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say \$200,000, on the railway, to be executed in favour of the officer of the bank or his nominee as collateral security for the notes, which Brooks agreed to give for the iron as delivered, such mortgage to be first and only first security or charge on the road until discharged; and which mortgage was to create a lien on the railway as such security, but was not to contain any covenant for payment by the company.

Brooks did accordingly sign a request for the company to execute a power of attorney and mortgage, and the same was accordingly executed to the officer of the bank. In pursuance of their contract, Bickford & Cameron did deliver at Belleville the amount of iron agreed for.

To enable them to do this, the Bank of Montreal had advanced money to Bickford, he assigning to the Bank the bills of lading for the iron, of which fact both Brooks and the president of the company were aware, and the legal ownership of the iron remained in the bank thereunder; but all the iron was delivered at Belleville for the purpose of fulfilling the contract. Brooks gave notes for the amount, but he having failed to complete his contract, Bickford sued for the notes and recovered judgment against Brooks. The Company and Brooks being both insolvent, the Bank, under the power in their mortgage, duly advertised a quantity of the iron which remained at Belleville for sale, and did offer the same for sale by public auction, when Bickford became the purchaser thereof at \$33.50 per ton, and he subsequently sold the same to another railway company, to whom he was about delivering it when the present bill was filed seeking to restrain the removal of the iron.

Under these circumstances, on the 2nd of October, 1876, an application for an injunction was made before Proudfoot, V.C., when an order was made restraining such removal. On the 9th of October a motion was made for an order to continue the injunction, but this Proudfoot, V.C., refused to grant. Subsequently, and on the 18th of January, 1876, the cause came on by consent, to be heard by way of motion for decree, when by consent a decree was made referring it to the Master, to take an account of what was due to Bickford & Cameron under the contract. On the 9th of February the Master made his report, finding \$46,841.10 due the defendants in respect of the iron laid on the track; but that nothing was due in respect of the iron delivered at Belleville and subsequently removed. The defendants claimed that they were also entitled to be allowed the sum of \$13.50 per ton on the whole of the iron sold, being the difference in price

agreed to be paid under the contract and the price realised for the same by auction, together with interest, and therefore appealed from the report of the Master; which appeal was argued before Vice-Chancellor Proudfoot, who, after looking into the authorities, dismissed the appeal with costs.

The case has since been carried to the Court of Appeal and argued, but a re-argument on certain points was directed.

James Belhune and Moss for plaintiffs.

Hector Cameron, Q.C., J. A. Boyd and Crombie, contra.

RE ROBBINS.

(April 27, 1876.)

Executors—Evidence Act—Compromising claim.—Corroborative evidence.

This was an administration suit. In proceeding in the Master's office at Brantford, a charge was made in the accounts of the executors of \$250 paid to one Millard, who had claimed to be a creditor of the testator to an amount exceeding \$1,000. It appeared that Millard had presented an account to the executors for the latter sum, which they declined to pay; and after some negotiations and several attempts at a settlement, the executors agreed to pay this creditor \$250 in full of this demand against the estate, and which he accepted. In passing the executors' accounts Millard was the only witness to prove the claim, which was alleged to be for money lent, and the Master disallowed the amount to the executors, adding to his conclusions from the evidence an additional reason for so doing, that "sufficient corroborative evidence to support it should be given under the statute, as there is no admission by the testator's books nor in any writing of his, and the legatees, who are interested and should have been consulted, repudiated the claim."

The executors appealed from this, amongst other findings of the Master.

BLAKE, V.C., said he thought the Master should not have found that the claim could not be allowed because there was not corroborative evidence, as in his opinion the act did not apply to such a case. He did not find his report wrong, and he did not actually dissent from his finding on the question; but the reason given would in effect prevent any executor compromising a claim made against the estate, which he was clear they had a right to do under the act as to executors, and therefore sent the matter back for the purpose of enabling the Master to reconsider his finding on this point.

Wilson and Cassels for appeal.

W. H. Kerr and G. Kerr contra.

SAWYER V. LINTON.

(April 23, 1876.)

Demurrer—Fraudulent conveyance—Certainty of allegation.

The plaintiffs, who sued as well on behalf, &c., by their bill charged that defendant Wm. Linton, being owner in fee of land in Haldimand, did, on the 2nd of January, 1872, for a "professed" valuable consideration, convey the same to the defendant John Linton (his son), who still owned the same; that in January, 1873, the said defendant Wm. Linton, and the defendant Thomas Linton, became indebted to the plaintiffs in the sum of \$450, for which they gave plaintiffs their promissory notes according to the terms of a contract between the parties; that on the 24th of January, 1876, plaintiffs recovered judgment on certain of the said promissory notes, and executions were issued thereon against goods and lands which remained in the hands of the Sheriff unsatisfied, the Sheriff being unable to find any property out of which he could make the amount of the writs. The bill further charged that the said conveyance "was made with intent on the part of the said defendants to defeat, delay, and defraud the said plaintiffs and the other said creditors," and prayed relief accordingly.

The defendants demurred for want of Equity, contending that the allegation of want of consideration was not sufficient, the words of the statute being "a pretended consideration;" that the bill itself alleged that the grantee, John Linton, still owned the land, which could not be the case if the conveyance were fraudulent; that it required to be stated that the conveyance was made with intent to defeat, hinder and delay the creditors, and that the whole relief now sought could have been obtained in the action at Common Law, under he ruling in *Knox v. Travers*, ante p. 148, the bill shewing that judgment had not been recovered until January, 1876.

BLAKE, V.C., overruled the demurrer, considering the statements of the bill sufficient to satisfy the requirements of the Statute of Frauds, both as to the want of consideration and the fraudulent intentions of the parties to the deed; that the bill correctly asserted the title to be in John Linton, for as between the parties to a fraudulent conveyance, the title did vest in the grantee; and as to relief having been obtainable in the action at law, it was impossible to say, from the allegations in the bill, that the action had not been commenced before the passing of the Administration of Justice Act, although

judgment was not recovered until long after that date.

Moss for demurrer.*McQueen* contra.

COMMON LAW CHAMBERS.

REG. EX REL. REGIS V. CUSAC ET AL.

(March 20, 1876.)

Municipal election—Want of qualification—Acquiescence of relator.

HARRISON, C.J.—An elector who, at a nomination meeting, acquiesces in a statement which, if true, would entitle the defendants to sit, will not be heard afterwards as a relator, to object that in fact the statement was incorrect, and that the defendants were therefore disentitled.

Oster for relator.*G. D. Boulton*, contra.

GORDON ET AL. V. G.W.R. Co.

(March 20, 1876.)

Appeal—Application for further time.

Application to extend the time for giving notice of intention to appeal to the Court of Appeal, on the ground that the attorney for the party desiring to appeal had omitted to give the required notice within the prescribed fourteen days. There had been a delay of a month in making the application.

HARRISON, C.J., held that the mere statement of an unexplained "oversight" on the part of the attorney was an insufficient reason for granting the leave, though it might be different if there were an important question of law involved as to which there was a conflict between the Courts; but he did not think that was the case here.

J. B. Read for application.*D. B. Read, Q.C.*, contra.

IN RE LADOUCEUR V. SALTER.

(March 21, 1876.)

Division Courts—Service of summons out of jurisdiction—Residence—Con. Stat. U.C., cap. 19, sections 71, 72.

HARRISON, C.J.—There is nothing in the Division Court Act to prevent a bailiff serving a summons out of the jurisdiction, though he is not obliged to do so. It is immaterial that a defendant is without the jurisdiction at the time he is served, if at such time he is in law a resident within the jurisdiction. In this case

C. L. Cham.]

NOTES OF CASES.

[Ontario.]

the defendant worked at Aylmer, in the Province of Quebec, whilst his wife and family lived at Rochesterville, across the Ottawa, in the Province of Ontario, where his wife kept a store, and where the defendant often came to see her. *Held*, that his residence was with his family.

J. B. Read for plaintiff.

A. Cassels for defendant.

REG. EX REL. HARRIS V. BRADBURN.

(March 28, 1876.)

Municipal Election—Leaving names of candidates of ballot papers—Acquiescence.

HARRISON, C.J. The name of a candidate who has been nominated, but who withdraws (with the consent of the electors) before the close of the nomination, need not be placed upon the ballot paper.

The omission of the name of a candidate from the ballot paper is not *per se* a ground for setting aside an election, if it is not shown that it has in some manner affected the result of the election.

The case of *Reg. ex rel. Regis v. Cusack*, followed, as to the result of acquiescence by a relator in irregular proceedings.

D. B. Read, Q.C., for relator.

Wells, contra.

PAGE V. FOSTER.

(March 31, 1876.)

Non pros.—No proceedings for a year.

Held (by MR. DALTON, whose decision was afterwards upheld on appeal by HARRISON, C.J., that section 81 of C.L.P. Act prohibits the defendant from signing judgment of *non-pros.* after the expiration of a year from the return day of the writ, and that he, as well as the plaintiff, is prohibited from taking any step after that time.

Osler for plaintiff.

Robinson & O'Brien for defendant.

DOOLAN V. MARTIN.

(April 7, 1876.)

Staying proceedings until costs of former action paid—Trespass—Malicious prosecution.

The plaintiff, in a previous action, sued in trespass, but was nonsuited, on the ground that her remedy, if any, was by action for malicious prosecution. She accordingly sued in the latter form of action. The defendant then applied to stay all proceedings until the costs in the first

action should be paid, on the ground that this suit was brought for the same cause of action.

HARRISON, C.J., (on appeal from Mr. Dalton, and reversing his decision) *held* that this was not so, and the application was refused.

Semble, that the jurisdiction to stay proceedings in cases of this kind should be sparingly used.

F. Osler for plaintiff.

W. R. Mulock for defendant.

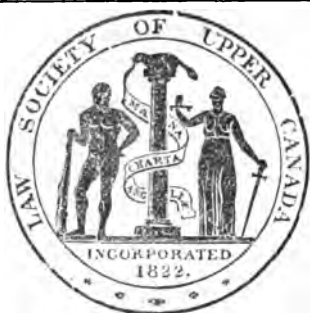
FLOTSAM AND JETSAM.

"The king, being God's lieutenant, cannot do a wrong." 11 Rep. 72 a.

ENGLISH SOLICITORS.—The duty on solicitors certificates—the name of "attorney" no longer being used in legal circles—amounted in the year ended 31st of March last to £94,433. The number practising in the United Kingdom was 14,409.

SCOTCH LAW COURTS.—Most people know the irreverent and slovenly way in which the oath is administered to English witnesses. The witness hurries into the box, and while judge and jury and the spectators are chatting and rustling in a pause of the business, the clerk of the court hands him a small Bible, which he holds in his right hand. The officer then recites his mumbled formula—"The evidence you shall give to the court and jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth. So help you, God!" The witness, without uttering a word, ducks his head and puts his lips to the Bible cover—unless he is cunning and ignorant enough to evade the ceremony by kissing his thumb. Now, in Scotch courts the procedure is far more dignified and impressive. When the witness appears, the Judge himself rises from his seat, and raising high his right hand, looks fixedly on the offerer of the evidence, who, as instructed, also raises high his right arm, and looks the Judge in the face. The Judge then, amid general silence, calls the witness to say aloud after him—"I swear by Almighty God to speak the truth, the whole truth, and nothing but the truth!" No paltry symbol is added to the simple solemnity of this declaration, which appears likely to be far more binding on the conscience of him who makes it before the Judge and in the silence of the crowded court.—*Leisure Hour.*

LAW SOCIETY, HILARY TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, HILARY TERM, 30TH VICTORIA.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law :

The names are given in the order in which the candidates entered the Society, and not in the order of merit.

- No. 1850.—JOHN WILLIAM FROST.
HERBERT CHARLES GWYNNE.
JONAS RICHY MITCALF.
ARTHUR GODFREY MOLSON SPRAGUE.
ROBERT GREGORY COX.
EDWARD DOUGLAS ARMOUR.
No. 1856.—ALBERT ROMAINE LEWIS.

And the following gentlemen received Certificates of Fitness :

E. GEORGE PATTERSON.
ROBERT PEARSON.
JAMES LEITCH.
ROBERT GREGORY COX.
THOMAS COOKE JOHNSTONE.
EDWIN PERRY CLEMENTS.
WILLIAM MYDDLETON HALL.
EDWARD DOUGLAS ARMOUR.
ALBERT ERNEST SMYTH.
HEBER ARCHIBALD.
JAMES CARRUTHERS HESLER.
GEORGE ATWELL COOKE.
DAVID LENNOX.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

WILLIAM EGBERTON PERDUE.
JOHN MORROW.

Junior Class.

SAMUEL JOHN WEIR.
FRANK EGBERTON HODGINS.
WILLIAM WHITE.
DANIEL ENASTUS SHEPPARD.
WALLACE NESBITT.
JAMES B. MCKILLOP.
JAMES MORRISON GLENN.
J. STANLEY HUFF.
MICHAEL A. MCHUGH.
ERNEST V. D. BODWELL.
HUGH D. SINCLAIR.
JAMES WILLIAM ELLIOTT.
ROBERT CASSIDY.
DUNCAN CHARLES PLUMES.
WILLIAM AVERY BISHOP.
FRANCIS ARTHUR EDDIS.
JAMES GARBUTT.
JOHN CHARLES COFFEE.
JAMES RIDDELL.
HOWARD JENNINGS DUNCAN.

Articled Clerk.

JOHN A. STEWART.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil, *Aeneid*, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—Caesar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams' Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be, as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows :—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,

Treasurer.

DIARY—CONTENTS—CONCERNING RETAINERS.

DIARY FOR JULY.

1. Sat.... Dominion Day—Confederation 1867. Long vacation begins. Trinity College Easter Term ends. Real Property Limitation Act, 1874, in force ex. certain sec.
2. SUN.. 3rd Sunday after Trinity.
3. Mon.. County Court Term begins. Heli and Devisé sittings begin.
6. Thur.. Last day for service of notice of Appeal for Court of Revision to County Judge.
7. Fri.... Gen. Simcoe, Lieut.-Gov., 1792.
8. Sat.... County Court Term ends.
9. SUN.. 4th Sunday after Trinity.
16. SUN.. 5th Sunday after Trinity.
17. Tues.. Heli and Devisé sittings end.
22. Sat.... Last day notice Primary Examination.
23. SUN.. 6th Sunday after Trinity. Union of Upper and Lower Canada, 1540.
25. Tues.. Battle of Lundy's Lane, 1812.
30. SUN.. 7th Sunday after Trinity. First English newspaper, 1583.
31. Mon.. Last day for determination of Appeals by County Judges.

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THE

Canada Law Journal.

Toronto, July, 1876.

CONCERNING RETAINERS.

THE law upon the subject of retainers is in a state of considerable uncertainty, from the fact that the judges almost uniformly refuse to offer an opinion upon questions of disputed retainers. We had occasion in former numbers of this journal to collect what little was to be found in the books upon this subject, and we now advert to it again *apropos* of certain correspondence which is published in our English exchanges. A question was lately submitted to the Attorney-General as to the object and effect of a general retainer to counsel as follows:

"On June 6, 1874, Messrs. A. sent a general retainer to Mr. Q. C. 'in Chancery,' and on November 12 another general retainer 'in all courts' for the same client. Mr. Q. C.'s clerk contends that under these retainers Mr. Q. C. is entitled to a brief in every case which comes into Court in which that client is a party; and that otherwise (Mr. Q. C.'s general retainer being known) no brief would be offered on the other side, and Mr. Q. C. would thus be prevented from appearing for either party. Messrs. A. contend that the object of a general retainer is to prevent the counsel from being taken against the client without the solicitor first having notice from counsel that a brief has been tendered to him on the other side."

Whereupon the Attorney-General (Sir John Holker) gave his decision:

"Under the circumstances stated I decide that Mr. Q. C. is entitled to have briefs handed to him in all actions in which the client for whom the general retainer was given is a party (but not in mere interlocutory proceedings, in the courts in which Mr. Q. C. usually practises.

"The general retainer will not, however, entitle Mr. Q. C. to briefs in the House of Lords or Privy Council, for which tribunal separate retainers are necessary.

"If briefs are not delivered to Mr. Q. C., the general retainer will be invalidated."

The *Solicitor's Journal* animadvertes upon this decision, but regards the matter only from the solicitor's point of view; that is to say, it advocates the view that the object of a general retainer is merely a device in the interests of solicitors to secure to them the first right of commanding the services of the barrister retained in each particular case, as it arises, where in the client is concerned. The natural consequence of this theory of general retainers is, that it is not deemed obligatory to send a special retainer and brief in each case at the peril, upon failure so to do, of forfeiting the general retainer. The result of this is that it casts the onus upon the counsel, when a special retainer is offered "on the other side," of notifying that offer to the solicitor by whom he is retained generally, and giving him thereby the opportunity of obtaining priority over the other applicant in each particular case.

This, however, is not the English practice, nor do we deem it desirable to alter that practice in any country where the functions of barrister and solicitor are so distinct as in England. The counsel ought not to be put to the trouble of serving notices on the solicitor, or to the annoyance of a *quasi* application for the delivery of briefs. It is, in our judgment, preferable to have it understood that the general retainer fails if on any occasion an application is made in Court (not of a merely interlocutory nature) without giving a brief to the counsel who is under a general retainer. There has been no settled rule in this province on this point, but we think that the views of the Attorney-General are rather to be adopted than those advocated by the *Solicitor's Journal*, which in truth transfer to the solicitors the right to determine whether counsel shall be bound by his retainer, and to pick and choose the occasions on which they will favour him with a brief.

Upon another matter, as to the extent

to which counsel may advise in a suit for both sides without being retained by either, there is much greater liberality—or perhaps, some will say, laxity—in England than obtains in this country. This point has been the subject of a judicial decision, which is but little known, but which is of great value as representing the views of so distinguished a judge as Sir Launcelot Shadwell, Vice-Chancellor of England. The matter was brought before him in an anonymous case reported in 3 Jurist, p. 603, and his opinion requested thereon. He is reported to have said, "I am of opinion that a counsel, unless he is retained by the plaintiff, has a perfect right to draw and sign the answers, though he may also have signed the bill. I remember a case of the same kind occurred to me when I was at the bar. I drew the bill, and not being retained by the plaintiff, I drew the answers. I then advised upon the evidence for the plaintiff, and then on that for the defendant. There was afterwards a motion in the cause, and I appeared on the motion, but on what side I do not recollect. I am clearly of opinion that unless a counsel is retained by the plaintiff, it is his duty, if required, to render his services to the other parties in the cause, although he may have drawn the bill."

One needs to remember the high character of the ideal counsel to understand how it was possible for this dual advisory system to originate. The counsel, like the judge, determined only on what was laid before him. He never imported into a case extraneous facts, the knowledge of which he had acquired elsewhere than from the papers submitted to him. The pleading once drawn, the advice once given, he made it a point to forget all about it, that his mind might be clear to undertake the next business to be disposed of. Nevertheless, whatever right counsel may in strictness have to advise on both sides, it is not well that such a privilege should

LEGAL EDUCATION.

be much indulged in. Counsel's *honorary* has degenerated into the fee fixed by tariff; his ancient dignity has undergone a somewhat mercenary change. It is not well that nowadays he should run counter to the views of common-sense laymen who do not understand how a lawyer can be on both sides of a case.

LEGAL EDUCATION.

CONSIDERABLE attention has been given to the subject of legal education in the State of New York, arising out of a conflict between the Court of Appeals and Columbia College. In the year 1860 this college obtained the privilege from the Legislature—a privilege already granted to two other universities—of examining its own students for admission to the Bar. Recently the Courts have framed rules for admission, and desire to reduce the system, or rather want of system, of admission to a definite order. This invasion of their privileges is resented by the universities, and we have been favoured with a copy of a lecture delivered by Mr. Dwight, Warden of the Law School, upon education in law schools in the City of New York compared with that obtained in law offices. Mr. Dwight points out with great force the advantages of a regular and systematic training in a school under qualified professors, undisturbed by the routine and drudgery of an office.

Among these advantages he claims—

"Law schools make the student acquainted with reports of law cases, ancient as well as modern, and their comparative value; teach him how to study the cases reported, and to apply legal rules to them, and thus give him an invaluable key to the great mass and volume of legal knowledge, which from many who do not attend them is wholly hidden. Next to perfect familiarity with a legal rule is the knowledge where to find it speedily when wanted, and this acquisition of a lifetime is most satisfactorily begun in the precincts of a law school;"

Most of all, he claims that law schools tend to prevent students from becoming mere technical lawyers, inspire them with a love for broad principles, and an aversion to all modes of spending time and talents in begetting and abetting knavery.

While admitting the value of what Mr. Dwight advances in favour of this mode of teaching, we feel that he injures his cause by the sweeping denunciation of office training, where, as he himself points out, the two professions of solicitor and counsel are not simply permitted to be practised together as with us, but are united, and one examination is required for both. Mr. Dwight says with much truth, that

"Three years' attendance in a law office, particularly in this city, has little or no effect in giving the student that comprehensive knowledge and severe mental training which fit him to understand and comprehend the law as a science, or to practise it as an art. The student can have little if any personal attention from the lawyer in whose office he may be, and, where clerks are numerous, scarcely even enjoys his personal acquaintance. What the student gets he picks up in a hap-hazard way, while hurrying to chambers and answering to his principal's causes, or driving as a copyist through a mass of manuscript, or keeping a register of daily business. It is a notorious fact that many of the young men in offices do no more than this during the entire three years, and some of them not so much. Where they are not paid clerks, they spend a large portion of their time as they see fit. Some of them perhaps repeat the poet Cowper's experience, who attempted to obtain a legal education in this way, and who informs us that he 'spent his time in giggling and in making others giggle, instead of studying law.' A young gentleman once called upon me to commence his regular law-school duties, and mentioned that he had been for two or three years in the office of a prominent lawyer. I remarked that his attendance there must have been of great service to him; to which he replied, that he supposed so, but he had never been introduced to the great man, much less had any instruction from him. Matters in the offices being in this state, the law school is an indispensable requisite to a complete training for the functions of a lawyer."

LEGAL EDUCATION.

But Mr. Dwight fails to see that the attorney or solicitor would begin practice at even greater disadvantages were he to rely exclusively on two years study in a law school. On this continent the practical union of the two professions necessitates a training which will give the advantages to be derived both from law schools and the routine of office work. These might be obtained either by a portion of time spent in office as a clerk and another portion as a student, or, as our practice has hitherto been, by attending lectures and examinations while under articles, and requiring a longer term of study than New York rules provide for. The question is one on which it is impossible to lay down any rules universally applicable, so much depending not only on the mode of admission, but on the ability of examiners and the uniform character of their attainments and fitness. We quite agree with Mr. Dwight that nothing could be worse than an examining committee chosen haphazard from among the Bar.

Whatever our faults may be, our method of teaching, examination, admission to, and most of all, retention in practice, both as solicitors and barristers, are worthy of study by our New York neighbours. We have our own faults; with the best intentions the round men are sometimes put into the square holes through friendship or accident. We are fortunately free from the greater evils which impair the uniform training of the profession in New York. Much may yet be done to raise the teaching of our law school, but it would be hardly fair to increase the assessment of the profession for this purpose. The Law Society must regulate the studies, not of the Toronto students only, but of those of the province at large. Anything more than this ought to be done by the Government.

No one who has attended lectures at the law school can fail to see the value of

the remarks of Mr. Dwight with which we close :

"A question has been asked in some quarters whether the professional force in Columbia College Law School is adequate to the work to be performed. It is manifest that in such an institution either one of two theories may be adopted. One is, to have a small number of competent men who will devote their entire time to their duties; and the other, to have a larger number, who give only a portion of their time to the law school, and devote the rest of it to their profession. The choice between these methods may depend upon the question whether the institution prefers to educate its students by formal lectures, or by true teaching, including catechetical instruction, informal and oral exposition, and free and ample right on the student's part to ask questions, both in the class-room and in private. We have deliberately chosen the latter course. We believe that it is of the highest importance to inspire the student with love for his subject, and to beget in him a true and lively enthusiasm. This can best be done by a teacher on fire with his subject, who has no distracting thoughts, who has a deep interest in and affection for his students, with sufficient personal magnetism to cause his interest to be reciprocated. Moreover, he must be perfectly familiar with his subject from every aspect, so that his students will have entire confidence in his opinions, and must have his resources entirely at command, so as not to be entrapped by an ensnaring inquiry, which young men full of mischief delight to put to an easily embarrassed professor. He must be master of the art of teaching, which experienced persons know to be not within the reach of every one. He must have personal dignity, so as to inspire respect, and a serenity of temper not easily ruffled, and must hold his class bound to him with an unyielding cord, and yet all its strands must be made up of confidence, respect and affection. If these qualities are possessed in large measure, one man can do the work of a score of professors who are languid and dull of spirit, and whose idea of official duty is to drive with dispatch to the lecture-room, deliver a formal lecture, and conclude it with a hasty bow and a speedy exit, to devote themselves to other and more congenial duties."

EXTRADITION—THE WINSLOW CASE.

THIS case, unimportant in itself, though said by wonder-mongers to conceal something of greater interest, brings up, and it is to be hoped will effect a settlement with the United States Government upon an important question under the Extradition Treaty. The following remarks from the *Times* gives a compact statement of the case :

“ Ezra Dyer Winslow, a citizen of the United States, having been arrested in this country on a charge of forgery in Boston, Massachusetts, and evidence having been produced which, in the opinion of the magistrate, would have justified the committal for trial of the prisoner if the crime of which he was accused had been committed in England, he was sent to prison on March 3, by Sir Thomas Henry. The forgeries were alleged to be extensive, but there was nothing extraordinary in the case itself. Under the Extradition Act fifteen days are allowed the prisoner after committal to apply for a writ of *habeas corpus*, and so test in a higher court the legality of the magistrate's decision ; but no discharge under such a writ was obtained in Winslow's case, and it is to be presumed that the committal was fully justified. Our Extradition Treaty with the United States is scandalously defective, but it does include the crime of forgery. Application was duly made by the Government of the United States for the surrender of Winslow under the extradition clause of the Ashburton Treaty. Nevertheless, the English Government have, under the advice of the law officers, refused to give him up to take his trial in the United States of America ; and when two months from his committal have elapsed—that is, in a month hence—he will be entitled to his discharge, unless the Judges hold that the events which have occurred constitute ‘ sufficient cause to the contrary ’ within the meaning of section 12 of the Extradition Act. The difficulty which has arisen is as follows : By section 3 of the Extradition Act a fugitive criminal is not to be surrendered to a foreign State unless provision is made by the law of that State, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his sur-

render other than the extradition crime proved by the facts on which the surrender is grounded. The object of the clause is clear. It is to prevent the process of extradition from being abused by way of procuring the surrender of persons charged with vulgar crimes, against whom the real accusation is some political offence, from the consequences of which they ought to be protected by our usage of granting asylum to political refugees of all parties. We tie our own hands in the same way by section 19 of the Act, which provides that where a person has been surrendered to us, he shall not be tried for any offence prior to the surrender, other than such extradition offence as may be proved by the facts on which the surrender is grounded. A clause embodying this principle is contained in all our modern extradition treaties, concluded since 1870, with Germany, Belgium, Austria, Italy, Denmark, Brazil, Switzerland, Honduras, and Hayti ; but the American treaty belongs to 1842, and contains no such restrictions. Of course this omission cannot override an Act of Parliament. Any Secretary of State who authorised the surrender of a criminal, having notice that the foreign country to which he was surrendered made no provision for confining the charge against him to that grounded on the facts proved here, would commit a grave breach of the law. With such notice the British Government appears to be fixed in the Winslow case, by the declarations of the United States Government in the case of Lawrence, a criminal who recently was surrendered. Moreover, the decision in the matter of Richard B. Caldwell, argued in the Circuit Court of the Southern District of New York in January, 1871, shows what the view of the American Courts is likely to be. Caldwell was indicted for bribing an officer of the United States. He pleaded that he was brought from Canada under the Ashburton Treaty on a charge of forgery. Judge Benedict held that whether the prisoner had been surrendered in good faith was a question for the Governments concerned and not for the Courts of Law ; and the prisoner, being in fact within the jurisdiction of the Court, and charged with a crime committed within that jurisdiction, must be tried for such crime without regard to the matter of extradition at all. He cited an English case tried before the Extradition Act. Whether Winslow is to be given up or not must therefore depend whether the United States Government will or can make an arrangement as to restricting the charge upon which he is to be tried, so as to satisfy the Extradition Act. We can have no wish to give shelter to American criminals ; but,

of course, our law must be obeyed by our own Executive, and strong grounds would have to be shown before we should alter our law on a point where it has been solemnly recognised by many treaties. The truth is that our extradition treaty with the United States is, like our treaty with France, a very insufficient one. It omits, for instance, the crime of fraudulent bankruptcy, though a fraudulent bankrupt is precisely the kind of criminal who would make his calculations with a knowledge of the law and of the means of escape. Negotiations have long been going on for an improvement, and it is to be hoped the present complications will hasten them. Meanwhile, it will be remembered that all we ask is reciprocity. For already, by our Act, we could not try an English forger surrendered by the United States, except for an extradition crime which might be proved by the facts established in America. It is matter for wonder that this question has not arisen before ; but, now it has been raised, our Government would appear to have no discretion in the matter."

It is said that England is ready to give up Winslow on a pledge that he will not be tried for any offence except that for which he should be extradited ; and that this is necessary is abundantly evident from the article quoted above. This pledge has not it appears as yet been given. In the meantime it is said that the Cabinet at Washington has decided to give notice to Great Britain of the abrogation of the treaty as regards the extradition of criminals, on the ground of the refusal to give them Winslow. This may be a move in the national game of " bluff." Unfortunately this instructive game is not well known in England, though we who are more familiar with the eccentricities of a democracy and can, so to speak, look over the shoulder of our cousin to the south of us, know that his play is not generally warranted by his cards.

The English Government, after being hoodwinked by that of the United States for a century, is beginning to wake up to the fact, that whilst the former has a theory, we are proud to say generally carried into practice, about the inviola-

bility of treaties and the spirit of treaties, the latter has a practice of breaking them and evading their provisions, on the theory that John Bull is so rich and respectable, and withal so stupid, that he will not notice their conduct or at least will not resent it. This is especially true in reference to the Alabama award. The United States improperly obtained an immense sum to cover certain specific claims ; after paying all these claims there was a surplus of several millions, which in common decency they were bound to return. But the question with them now is not, whether they shall return it, but to what purposes of their own they shall apply it. In fact one is irresistibly reminded of a pack of thieves squabbling over stolen goods.

SELECTIONS.

LIABILITY OF BARRISTERS FOR NEGLIGENCE.

LAST week, in the House of Commons, two votes of censure were proposed ; one on Her Majesty's Government, the other on the Bar of England. The former motion was defeated by a majority of 108 votes, and the latter by a majority of 107 votes. It is highly satisfactory to find that the Bar is at least as strong as one of the strongest of modern Administrations ; perhaps we ought to say that the division lists prove the superior influence of the bar, for, while 226 members voted against the Government, only 130 members voted against the bar. Pessimists, timid people and satirists of the profession may think that a body, which has 130 members of the House of Commons hostile to it, is in a bad way. But in all times the House has boasted of a goodly supply of persons ready to support an attack on, or a supposed reform of, any institution, and there is nothing remarkable in one fifth of the House approving Mr. Norwood's bill. Of the minority many must have been actuated by the feeling, which very naturally and properly predominates in a great commercial

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country, that people ought to be paid for their work, and ought to work for their pay; and with this feeling all honest men must sympathise. Therefore, when the House has been told, and told with truth, that instances have occurred of leading counsel taking heavy fees, with the full knowledge that there was no prospect of their presence in Court to conduct the case, and that instances have also occurred of haggling for an increase of fees after the brief has been accepted, it is not a matter of surprise that business men should seek a remedy for such evils, and should vote for Mr. Norwood's bill as a means of cure. The bad luck in litigation of Mr. Norwood's colleague, which was supposed to be a remarkable example of the risks run by suitors, may also have augmented the number of votes; for, although the case was not mentioned in the debate, it has probably been plentifully discussed in the clubs and the tea-room. Then, again, the speech delivered by the member for Londonderry probably commanded several votes; for when a solicitor of some repute denounces professional misconduct, and declares that a measure before the House will put an end to it, it would be strange if the declaration were not believed by a large number of persons who have no personal knowledge of the question, but justly deem such evidence worthy of consideration.

Now, there is one point upon which no one seems inclined to offer any information, and upon which certainly nothing like precise information was afforded to the House, and it is this: How many barristers are open to the accusation of taking briefs when they know they cannot be present at the hearing of the case? Mr. Norwood says that the whole of the Chancery bar is immaculate, and that a verdict of not guilty must be recorded for that section. Next, as far as we can gather from all that has been said or written on the subject, no indictment is preferred against the junior counsel of the so-called Common Law bar. The question, therefore, narrows itself to the Queen's counsel and the serjeants who practice at Westminster. Then, how many of these are to be pronounced guilty? Shall we say a dozen, half-a-dozen, three, or one? For our part we

should be ready to make a challenge against the possibility of proof in the case even of half-a-dozen barristers. No doubt two or three counsel can, if they are recklessly indifferent to the honour of the profession, do enormous mischief. But, although a dozen righteous men may save a city, three wicked men ought not to involve the condemnation of a profession which boasts nearly two thousand persons in actual practice. Assuming that there are some few persons who come rightly under Mr. Norwood's lash—and he himself admitted that "the evils complained of were only committed by a small section of the profession"—cannot we see our way to a remedy without putting in force such a measure as Mr. Norwood proposed? Nobody is obliged to retain these barristers who are charged with this misconduct; and what is more, if their retainers were cut down to a reasonable number per annum, the evil would at once cure itself; for it is not pretended that these counsel take their fees, and then go off to Richmond Park or Ascot races. They are in Court hard at work—about that there is no mistake. Diminish their briefs, and away go their sins and their fees at once. Therefore, we are at a loss to understand how a solicitor can gravely get up in the House, and say that the disease is so bad as to require the drastic remedy proposed by Mr. Norwood. Clients, no doubt, will run after fashionable barristers, just as patients will run after "crack surgeons," and such suitors will grumble at the scanty attention they get, just as the patient does. In all cases where, for a moderate fee, expectations are entertained of securing very fashionable counsel, who have the reputation of taking briefs recklessly—that is, if there are such counsel—it is the duty of solicitors to warn the client of the risk of non-attendance.

We have spoken of this question as restricted to barristers who err from want of sufficient discretion and caution in taking briefs, for Mr. Norwood does not go so far as to say that a barrister who takes a brief is to be present at the hearing at all hazards and in all events. The most superficial acquaintance with Law Courts would prevent any man from falling into such an extravagance as that. It is no uncommon thing for a case in the

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new trial paper to be imminent for a month or two at a time. Only last week it was announced in all the morning papers that the Exchequer Division would sit in Banco on Friday to proceed with the new trial paper. But when the morning came there were no judges to make a Court. Somebody had blundered in calculating the number of judges and in arranging the business. On other days announcements have been made that certain judges would sit for trial of actions with juries, but no judge has been forthcoming. No human being can tell within weeks when actions, motions and orders for new trials will come on in the Queen's Bench, Common Pleas and Exchequer Divisions; and, therefore, no barrister, however honest, careful and diligent he may be, can help being wanted in two or three places at once. Even the most exact followers of the doctrine that work must follow pay would hardly insist that, if a barrister took a ten-guinea brief to argue an order for a new trial, he was to take no other brief till that case was disposed of. The bar, as a whole, is not very highly paid; but ten guineas a month would be a dreary look-out. The fact is, the work of the profession differs from all other kinds of work in this respect, that the workers have no control over the order in which the work has to be done. One day is an idle one; the next presents a dreadful concurrence of work to be done in two or three different places at once. What is there in human experience similar to this? Death may not wait for the doctor; but he satisfies law and common sense by going as soon as he can. The clergyman finds that Sundays and feast-days recur with inevitable regularity. The author can forecast his labour with absolute accuracy. The artist knows the day on which his picture is to go to the Royal Academy. Manufacturers, colliery proprietors and tradesmen are sometimes afflicted with a great press of business; but the law, if it possibly can, rules in their favour that time is not of the essence of the contract. But the unfortunate barrister has to deal with quick judges and slow judges; with actions that settle themselves in ten minutes, and actions that drag on for days; with Courts which sit when they ought not, and Courts which

do not sit when they ought; with Courts which give no notice of what they intend to do, and Courts which give notices and do not fulfil them; with Courts of First Instance and Courts of Appeal; and, worse than all, with clients who have staked their property and their hopes on one issue, to whom the result of one action means ruin or a good haul of money, and who are stung to madness on finding that thirty guineas has failed to secure the sole, undivided and matchless talent of one of the most fashionable counsel of Westminster Hall. Because even barristers fail to meet the emergencies thus presented to them, it is suggested as a reasonable proposition that the disappointed litigant should ask a jury to inquire whether the counsel used every foresight and care when he accepted the brief; whether he was guilty of negligence in undertaking the case, having regard to his other briefs, and the action of the several Courts; and to say, if the barrister is found to be in the wrong, that damages shall be assessed against him. Even if such a right were conceded to the suitor, the barrister would have the consolation of knowing that, *ex hypothesi*, the action was lost by his absence, and that because he was not there the judge and jury made fools of themselves. However, Mr. Norwood's bill is killed for this session, and we venture to predict that some years will elapse before a like measure is again subjected to the ordeal of a second reading in the House of Commons.—*Law Journal*.

IMPRISONMENT FOR DEBT.—The *Law Times* says:—Mr. Josiah Smith, Q.C., Judge of the County Courts of Shropshire and Herefordshire, has delivered an elaborate address upon the subject of imprisonment for debt. The learned judge admits that the system works well, and secures the payment of debts "without grievance." The picture which he draws of the life of a County Court Judge, who has to dispose of a large number of judgment summonses, is, however, harrowing in the extreme. His Honour himself has "groaned" under it for over ten years. He has frequently heard 100 in a single day, and once had before him no less than 450. "It has," he says, "been

the source of the greatest anxiety to me what to do for the best, particularly when the debtor had two or more judgments against him, as is frequently the case. And I believe few have exercised a greater amount of self-denial than the judges of county courts in upholding this painful jurisdiction." His Honour expresses the opinion that several committals should be allowed in respect of one debt, until the whole six weeks are exhausted. Another practical suggestion which he makes is, that notice should be given to absent debtors of the order of commitment made against them, and that it would be enforced unless the monthly instalments are regularly paid.

An indictment charging that the defendant *forged* a certain writing obligatory, by which A. is bound, is void for its manifest inconsistency and repugnancy. The Court:—"That is a wheel in a wheel, and can never be made good." *The King v. Neck*, 2 Show., 472, 3rd ed.

CANADA REPORTS.

ONTARIO.

ELECTION CASES.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

COURT OF APPEAL.

MUSKOKA ELECTION PETITION.

JOHN C. MILLER, (*Respondent*), *Appellant*, v.
ANDREW STARBATT, (*Petitioner*), *Respondent*.

Undue Influence—General promises by ministerial candidate—Cumulative evidence.

Appeal from a decision of Mr. Justice Wilson, avoiding the election and disqualifying the respondent.

Both the respondent and his opponent claimed to be supporters of the Ministry of the day; but the respondent was the recognised ministerial candidate, and claimed that his opponent, having originally pledged himself to support him, and then come out in opposition, could not expect to retain the confidence of the Government, and that, as the ministerial candidate, whether elected or not, according to his ideas of constitutional practice, the patronage in the constituency would be in his hands. There was a grievance in the Riding that strangers were sent up to superintend the work on the roads, and the respondent was reported to have stated at a public meeting that he would endeavour to get the evil remedied, and that "he would have the patronage, as

he was the choice of the Government—he would have it whether elected or not elected;" adding by way of explanation, "It was the laying out of money on the roads and appointment of overseers."

The Judge who tried the case held (1) that such language did not amount to an offer or promise of any place or employment, or a promise to procure, or to endeavour to procure any place or employment to or for any voter or other person, within the 1st sec. of 36 Vict., cap. 2; but he held (2) that it amounted to undue influence within the 72nd sec. of 32 Vict., cap. 21, or according to the common law.

Held, that the first finding of the learned Judge was correct, but that the second was incorrect.

The respondent was charged with several acts of corrupt practice. As to four of them he took time to consider, and subsequently found three proved. Each separate charge was supported by only one witness, and each was separately denied or explained away by the respondent. There was no corroborative testimony on either side. The Judge below thought that if each case stood by itself, oath against oath, each person equally credible, there being no collateral or accompanying circumstances either way, he should hold the charge not to be proved; but as the charges were severally sworn to by a credible witness, the united weight of their testimony overcame the effect of the respondent's oath; and he felt compelled to attach such a degree of importance to the combined testimony of these witnesses as to hold that the charges to which they severally spoke were sufficiently proved in law as against the opposing testimony of the respondent. *Held* that this view could not be sustained, and the appeal was allowed.

(January 22, 1876.)

Appeal from the judgment of Mr. Justice Wilson, before whom the case was heard on 26th to 23rd July, 1875; and who found the respondent guilty of corrupt practices.

At the close of the evidence, the petitioners confined themselves to fifteen cases, all of which, with the exception of four, the learned Judge then disposed of. Of these he subsequently held one disproved; and although in two of the other charges (which may be designated as the Hill and Sufferin cases) he would have been inclined to find in favour of the respondent upon the evidence affecting these two cases alone, he ultimately came to a conclusion adverse to the respondent in consequence of the effect upon his mind, and the view which he took of the remaining charge, viz: a speech made by the respondent in the course of his canvass at the Matthias Hall, and which the learned Judge held to be a violation of the 72nd sec. of 32 Vict., cap. 21; or if not within that section, to be undue influence under the common law of Parliament. The learned Judge came to this decision, as he stated in his judgment, with much doubt and hesitation, and adversely to the opinions of some of his brother Judges with whom he had consulted, and expressed a hope that the case would be carried to appeal.

Elec. Case.]

MUSKOKA ELECTION PETITION.

[Ontario.]

It is important to give in full the argument of Mr. Justice Wilson as to the speech at Matthias Hall.

After re-iting the evidence, he said :

"I must make out in the first place what Miller really said, as well as I can extract it from the above accounts of what he said.

"His own statement, especially when it is adverse to him, may be accepted as a genuine account of his language. The respondent says he used the words following : 'I was the recognised ministerial candidate, having been nominated by the Reform party. That I understood it to be the constitutional practice, here and in England, for the ministry to dispense, as far as reasonable and practicable, the patronage of the constituency on the recommendation of the individual who had contested the constituency in favour of the Government.' He said, 'I did not state I would have the patronage whether elected or not. I said I understood the constant practice was as above stated. I said the patronage would be in me, and I would redress the grievance complained of, that is,' as he expressed, 'if elected.' The respondent, although not now in words, in effect shows that he did say or gave those at the meeting to understand that he would have, as the Government or ministerial candidate, the influence or patronage of the Government in the district whether he was elected or not, because, he says, he told them he understood the practice was 'that the Ministry should dispense the patronage of the constituency on the recommendation of the individual who had contested it in favour of the Government—not on the recommendation of the person who had contested the constituency in favour of the Government, if that person were successful at the election, or were elected, or, in other words, on recommendation of the member if he were a Government supporter, but on the recommendation of the person who contested the constituency on the Government side, or in other words, whether he was successful or not.

"Dill, one of the respondent's witnesses, says : 'To a certain extent Miller said, as I understood him, that, being the supporter of the Government, he would have the patronage whether he was elected or not.' Meyers, also one of the witnesses, says : 'His speech was that, as he was the Government candidate, it was the interest of the people to support him whether he was elected or not ; that he would have the patronage and Mr. Long would not—he was not the Government candidate.' The petitioner's witnesses are quite sure that Miller

declared he would have the patronage of the district whether he was elected or not, because he was the Government candidate, and Long would not, of course, have it although he were elected. Assuming, then, that the respondent did use such language, and on the occasion spoken of, is it an offence within the Election Act, or is it an act or the exercise of undue influence 'recognised by the common law of the Parliament of England,' according to 36 Vict. cap. 2, sec. 1 ? Is such language an offer or promise, directly or indirectly, of any place or employment, or a promise to procure, or endeavour to procure, any place or employment to or for any voter, or any other person, in order to induce such voter to vote or refrain from voting ? The language was, in effect, 'I am the Government candidate, and, because I am so, I shall have the patronage and influence of the Government as to appointments and in the laying out of money appropriations in the district roads, and in the appointment of overseers for such works, and I shall have such patronage and influence whether I am elected or not, and I shall take care that no outside persons, but residents only of the district, receive such appointments.' I think it is not an offer or promise of any place or employment, or a promise to procure, or to endeavour to procure, any place or employment to or for any voter or other person. I think it is not so, because the number of overseers in the district would be comparatively small for the expenditure to be made there, and the promise, if one were made, was not exclusively addressed to those present at Matthias Hall, but to the whole constituency. If the respondent had said the district was about to be formed into a county, and a sheriff would have to be appointed at once, and he would have the disposal of that office, and he would see that a resident of the district would get it, I think it could not properly be said that the respondent had offered or promised a place or employment, or had promised to procure, or had endeavoured to procure, a place or employment to or for any one within the meaning of that section of the act.

"The expectation that each one of the constituency would form or might form on such language, would be of the vaguest and most indefinite kind. But if the respondent had said that 100 or 500 men would be required for a particular work at good wages and for a good while, and he would have the selection of them, and he would take care they were taken from the district, and that no outsiders should be employed, and that he would have that patronage

whether he was elected or not, I am disposed to think that such a case might be brought within the operation of that section of the statute. For, although there was nothing addressed to any particular 100 or 500, and the persons to be selected could not then be known, yet the great number who were to be employed would afford and support a very strong ground for each person supposing that he might be one of so numerous a body; and in that way, although the offer or promise were not made to any specified body or number of persons, it was made to such a body and numbers that it operated practically in influencing a very great number of people, and raised just expectation that the promise so made would be or might be fulfilled to each in his own case. A promise to two to employ one, not naming which one, would, in my opinion, be within the act. A promise to one thousand to employ one of them, would, in my opinion, not be within the act. In this district there were at least 1400 voters polled. Those capable of being overseers, or who might probably look for or take the office, I only conjecture, perhaps there were several hundreds; and as the expenditure was not very large (I am not sure whether it was named or not), the number of overseers would not be very numerous. The data are not given to me to state them accurately; but I have no reason to believe that acting upon the rule which I have stated, the exact facts if I knew them, would establish a case, within the provision of the act, of an offer or promise of any kind respecting place or employment which could possibly be called an offer or promise having been made contrary to that enactment by the respondent. If it is a violation of the act, or of the common law of the Parliament of England, it must be by reason of its amounting to undue influence by the respondent.

"The 72nd section of the act defines what is undue influence under that act. 'Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of, or threaten to make use of any force, violence or restraint, or inflict or threaten the infliction by himself or by or through any other person of any injury, damage, harm or loss, or in any manner practise intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, &c., shall be deemed to have committed the offence of undue influence, and shall incur a penalty of £200.'

"Can the case be brought within the terms just quoted of that section? If it can it must be by

the following words of the statute:—'Every person who shall directly or indirectly, &c., make use of, &c., any restraint, &c., or in any manner practise intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting &c., shall be deemed to have committed the offence of undue influence.' The word *restrained* is used, it will be seen, in connection with *force or violence*, and so may be said to mean some physical restraint. But *menace* has been held not to be confined to indicating only bodily injury. . . . I think language may be addressed to a body of electors which, by a particular person, may constitute a restraint upon the free action of the electors.

"Now what I have to determine is, whether the language in question can be held to have been a *restraint* upon or against any person in order to induce or compel such person to vote or refrain from voting? or whether it can be said the respondent, by his language, in any manner practised intimidation upon or against any person for the like purposes, or whether it can be said to be an act or the exercise of undue influence recognised by the common law of the Parliament of England, within the meaning of the statute. Too much strictness must not be imposed upon election speeches. It is said 'a hustings's speech has become almost a proverb for insincerity.'—'Freeman's Federal Government,' p. 83. But that will not sanction anything being said without any check or restraint. I do not pretend to define the limit or subjects of a candidate's speech to electors. He will be quite sure to remember his own qualifications in some form or other, and to present them to the electors as grounds as satisfactory to them as they are to himself, why they should prefer him to the other candidate or candidates. He will probably, if he follow the custom in such cases, promise much of what he will do, if he be elected, and he will probably also recount at their full value his former work and services, and devotion, and perhaps losses, in their interests and for the sake of the cause, whatever that may happen at the time to be.

"He may with great propriety refer to such services and show what he has accomplished or attempted to accomplish, and to his experience in and knowledge of the business of legislation and the general duties of a representative.

"He may contend he can do more for the welfare of the country and of his constituents in particular from such knowledge and experience and by reason of (what his friends say he has) his abilities.

"He may rely also upon his local position, his intimacy with public men, his wealth, &c., as advantages in his favour. He may perhaps say that, being a supporter of the ministry of the day, he hopes he may be able to do more for the locality he claims to represent than the other candidate or candidates can do, who are in opposition to the ministry or to the Government, according to the general mode of speaking of the administration; and he may say that he will get such a public work done in the locality, or the timber dues remitted, or the land reduced in its valuation, or other advantages granted to the settlers.

"And he may perhaps say, if in office, that by reason of it he will be able more effectually to have carried out what he may undertake to do than the other candidate or candidates who are not in office.

"He will be quite sure not to recommend his opponents too much, for elections are not commonly gained by praise of the opponent. A rich man may say he spends largely in the neighbourhood, and he employs many men, and he employs only those who are residents: for he is speaking only of facts and of past matters; and I think he might add that he would continue to follow the same course. How much further he might go, or how much further a mill-owner or contractor might go, I do not conceive it to be necessary for me to work out.

"If a minister of the Crown were to say he had the patronage of his office which was very great, and he would distribute it or he would use his influence to have it distributed only among those of the constituency, he would be using his office, I conceive, improperly.

"There could be no legal objection to the Commissioner of Crown Lands, or of Public Works, declaring that he had the expenditure of a very large sum yearly. But I think he could not properly say he proposed to lay so much of it out in the constituency, and to employ only the residents of the electoral district or the electors. He might say he had the expenditure or the patronage referred to, if he states the fact simply to show the labour or duty of his office, but if it were stated for the purpose of influencing the electors it would be objectionable.

"It is the intent, of course, with which a thing is said that makes it either objectionable or not objectionable. It is manifest that if some one said that a particular officer had the expenditure and patronage, and the candidate were to say that was an error, for he had them both, there would be nothing wrong in that.

"But if a candidate were to ask another for his

vote, and to say to him, I have a large sum of money to lay out here, or I have great influence in having it laid out here, and there will be work for the people about, it would be wrong in him to say so. Now addressing a body of electors is canvassing, the candidate speaks to the electors because he wants to secure their votes. It is canvassing often of the most effectual kind, and it is sometimes nearly all the canvassing in a comprehensive manner, and on a large scale, that is done; and what is said on these occasions must generally be judged of in the same manner as if said to a single elector. The question in all these cases is whether an inducement was held out improperly to influence the electors, and to control or subdue their free will and judgment. Was anything improperly done to prevent the electors from choosing fully which of the candidates they would support, and to induce or compel them as it were to vote for one, although not their choice, and to give up the other. The question is one of fact and intent. A landlord may legally give a notice to quit at the proper time to his tenants, but if he do so during an election because their politics are different from his, very little done or said at such a time may show it was done by or was an abuse of influence. So the like as to a master dismissing his workmen, and also as to the withdrawal of custom from a tradesman.

"When the respondent made the declaration he did, which is the subject of this charge, what was its nature, purpose and import? It was to show the electors that under any circumstances, he, the respondent, would have the influence and patronage of the Government in the electoral district, and that he would distribute them among the residents; and that under no circumstances would his opponent have any such favour or influence. The effect of that was to draw votes to himself, and to withdraw them or keep them from his opponent; and it is a fair conclusion that the respondent intended to bring about such a result, for it is the natural tendency of the language which he used. It must be assumed that it was his purpose so to do. I think that it is not a fair or warrantable course of argument to take. It does interfere with the free deliberation and choice of the electors of their candidates. It is made hopeless to struggle against the influence and patronage of the Crown so to be exercised, and useless to vote for a candidate who is in no case to have any voice or influence in such matters in the constituency. Whether such language will operate upon a large body of the electors, or upon what precise number it will operate, is

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not so much the question. It will undoubtedly operate upon some of them, especially in this district, a newly settled, sparsely peopled, and what may be called a poor settlement. Poor, because newly settled, and because the labours of the people are turned to the clearing of their land and the establishment of a home for their families. They have not received and are not receiving the return as yet of their labour. Their effort is to live until they can make their land remunerative; and such language must have been designed to operate upon them prejudicially and unduly as affecting their choice of a candidate; for, of course, the candidate in dispensing his favours will prefer those who supported him to those who opposed him. I don't place any stress upon the respondent calling himself the Government candidate or the ministerial candidate. It is the common mode of speaking. All that is meant by it is, that he is the person that the party which supports the ministry has selected as its candidate. No one thinks that the Government or ministry has actually selected a candidate and put him forward as its nominee in the contest. I do not think either that the respondent saying that *it was the custom and by parliamentary practice* he would have the influence and patronage, whether he was elected or not, alters the character or the force or effect of the language.

"It is the fact that the minister in his department has the patronage of it, and that the contractor has the choice of his workmen. And it would not lessen the objection of their holding out what they could do, and what they meant to do in the district, and how they meant to spend their money and distribute their patronage among the electors, by telling them at the same time that they had the right and power to act on these matters as they pleased—the minister by custom of parliamentary practice, and the contractor because he may do as he pleases with his own.

"I have found in more than one of these election trials that the voters are often urged to support the Government candidates as a matter of duty. Perhaps that is by confounding the ministry with the Government. Perhaps all parties should support the Government of the country, that is, should maintain the honour, credit, independence, and stability of our institutions as established according to the constitution, or in the words and in its proper sense—the Government. But to say that all parties should maintain the ministry of the day, or his party in power, is an absurdity. It was said

the late Dominion administration had become obnoxious to the people, but to contend that notwithstanding that, the people should support it, would be folly. It is said by the opponents of the present administration, that they should not be allowed to remain in office because of faults and failings and misconduct which one party can always make against another, and to say that the electors must support the present administration would also be an act of folly. When people are told they should support the Government candidate, it is because the person who so urges it is using unconsciously the word Government in its narrower sense, or is consciously using it as implying that the other candidate is hostile to the Government or constitution of the country, or as implying that it is more for the interest of the electors to stand by the party which has the power and patronage, than to aid a party which has nothing to give, and from which nothing can be got or expected.

"This latter argument is one closely trenching on forbidden ground. It may be presented in such a way as to be quite as objectionable as the language complained of against the respondent. What is it but a bid for electoral support by a promise of Government advantage in some material form or other? I put out of consideration all those arguments addressed to the electors by the candidates, the one saying he is in favour of a new road, or a canal, or a railway, or some other object, and that his opponent is not, and that he, the speaker, will press the performance of that work, and it will be a great advantage for the people of the constituency, because it is one of the duties of a representative to attend to matters of that kind, and he may as freely speak in that matter on such subjects as he may speak on changes in the school law, or in the tariff, or on any other matter not so peculiarly affecting the constituency. There is a difference between such a line of argument and the candidate saying he will have the patronage and influence of the Government in all the work and expenditure to be done or to be made in the constituency, and that he will have them whether he is elected or not, and that he will see that no outsiders participate in these benefits, even although he should add that he would have that power and patronage according to the custom of the parliamentary practice in such cases. I consider that, fairly interpreted, to be the exercise of undue influence, not of Government influence, but of influence in the name of the Government by the respondent, and if it be not that, or do not mean that, it means nothing. But I have no

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doubt it was meant for a purpose, and that purpose could only have been, and in his case it was, I think, unduly to influence the electors in their free choice and deliberate judgment of a candidate.

"The conclusion I come to with reference to this charge is, that I am inclined to think the respondent did make use of restraint or practise intimidation upon the occasion in question upon or against the electors present at the meeting at Matthias Hall, and perhaps upon or against those who were not present, in order to induce or compel such persons to vote, or refrain from voting, at that election. Or if the case do not come within that section of the statute, I am of opinion it must be undue influence according to the common law of the Parliament of England. New modes of undue influence must or may be practised from time to time which may not be covered by the written law, but the principle of the law itself, written or unwritten, is, that the election must be free: Inst. 169; 1 W. & M. Sess. 2, cap. 2, secs. 1, 2; 2 W. & M., Sess. 1, cap. 7. That the electors must be allowed freely and indifferently to exercise their franchise, and it is for that cause an election is vacated by riot or other serious disturbance, or by general drunkenness, or by general bribery, although neither the sitting member nor any one for him had anything to do with such acts: *Lichfield case*, 1 O. & H., page 26; *Bradford case*, 1 O. & H., 40; *Beverley case*, 1 O. & H., at page 147; *Slaford case*, 1 O. & H., at page 234; *Tamworth case*, 1 O. & H., at page 85. However varied or novel the acts or conduct of those may be who proceed in such a manner as to violate the freedom of the election, can make no difference in the law. If the law itself be broken, if the whole election be rendered in any manner or by any persons, not free, the result must be that it will be vacated as a void election. If the whole election be not so affected, but the sitting member or any of his agents is or are chargeable with certain acts of violation of such freedom, the return of the election of that candidate will be avoided.

"But if the candidate is in no way chargeable with any individual case of violating the principle of a free election, his seat will not be affected; the vote or votes which may be affected by it will be deemed to be illegal. There is a resolution of the Commons of December, 1779, Journals 507, against the interference in elections by ministers of the Crown—"That it is highly criminal in any minister or ministers or other servants under the Crown in Great Bri-

tain, directly or indirectly, to use the powers of office in the election of representatives to serve in Parliament, and an attempt at such influence will at all times be resented by the house as aimed at its own honour, dignity, and independence, as an infringement of the dearest rights of every subject throughout the empire, and to sap the basis of this free and happy constitution."—Rogers on Elections, 9th ed. In Chambers' Election Law, p. 374, it is said the interference of ministers was made a principal ground of avoiding the election in the *Dublin case*, 1831. That case I have not seen. The only one I have seen, where a charge was made against the interference of ministers of the Crown, is the *Dover case*, Wolf & Br., 121.

"If it is highly criminal in a minister of the Crown to use the power of office in electoral contests, it must be objectionable for a candidate to assert that he has and will have those powers, although he is not in office, because he is the Government or ministerial candidate, whatever may be the result of the election. The powers of office are not to be used in the contest, and whether they are used by a minister or a friend, ally or supporter of the minister, must be alike vicious and objectionable. Of course, in all of these cases I am assuming that such a course of proceeding is adopted with the intent mainly to influence the election: for, as I have already said, the intent is everything in such a case. These powers of office are the patronage and influence which that office confers. The exercise of that patronage and influence by delegation to a ministerial supporter is quite as effectual to operate perniciously on the freedom of elections as if the powers were exercised by the principal himself. I see no difference between a minister saying to the electors in an electoral district in which there are Crown lands to be valued for the settlers, 'I have the power and patronage of the valuation of all your lands'—or, 'I will have the valuation of them'—if said with the intent unduly to influence the election in which he is a candidate, or the supporter of a candidate, and another person (not a minister, but the friend and supporter) saying the same thing by reason of his being such supporter, and of his contesting the constituency in favour of the Government, if such person say it with the like intent; and the same thing applies to language of the like kind addressed to lumbermen with respect to lumber dues in their imposition, omission or otherwise, and to the expenditure of Government appropriations in the opening of roads or in the performance of other public works. I am

obliged to find the fifth charge has been sustained."

The argument of the learned Judge on that branch of the case which was especially referred to by the Court of Appeal, namely, as to effect of answers to charges, each one supported by a different witness, but severally denied by the respondent, without any corroboratory testimony, fully appears in the following judgment, where Mr. Justice Wilson's language on that point is fully quoted.

James Belkune, for appellant.

Boulbree, contra.

DRAPER, C.J.—I agree in the conclusion arrived at by my brother Burton, that the appeal should be allowed and the petition dismissed.

But a principle as to the law of evidence was laid down in the *North Renfrew* case (not reported), which was referred to and acted upon in the present case, with regard to which I entertain some doubts; and I do not wish, by passing it over in silence, to be supposed to concur in it, or to have been influenced by it in being a party to the judgment now given. I am not deciding one way or the other.

It has been distinctly enough held that on a petition charging any corrupt practice, the respondent is, in a case of even and fully counter-balanced testimony, entitled to the presumption of innocence, to turn the scale in his favour. Now the question presented in the present case is, whether the evidence can be said to be so equally balanced as to render it necessary for this respondent to invoke the aid of that presumption, or, on the other hand, to entitle him to it. It is put in the judgment in the following shape: "The question is, whether the evidence can, on this record, be said to be equally balanced, so as to give him the right and benefit of all just presumptions of law and of fact. That will depend upon the other charges which are still to be considered; for if in the other cases I find that they are respectively balanced by the evidence of the respondent, the same witness in all of them as against several witnesses—one, however, only in each case—I should then feel obliged to rely more on the impartiality and truth of the greater number who testified against the respondent, and whose evidence and characters were respectively for reliability and veracity, as much to be depended on as those of the respondent. I have already stated my opinion on this point in the *North Renfrew* case."

In another part of the same judgment it is said: "If this stood by itself, as before stated, oath against oath, and each side equally credi-

ble and no collateral or accompanying circumstances to aid me either way, I should hold the charge not to be proved. But the other charges, if severally sworn to by a credible witness, and the united weight of their testimony is to overcome the effect of the respondent's word (second oath), I may be obliged to attach such a degree of importance to the combined testimony of these witnesses as to hold the charges to which they severally speak as sufficiently proved in law against the opposing testimony of the respondent."

In the *North Renfrew* case there were nine independent charges of corrupt practices committed by Thomas Murray, the brother and agent of the respondent. Each charge was proved by one witness only, and was based upon offers or promises, not upon any act of the agent. Admitting the general circumstances and much of the conversation, and in the very words of each witness, Thomas Murray gave a different colour to the language and a different turn to the expression used, which altered the meaning of the conversations detailed by the witnesses, and so constituted in effect a complete substantial denial of the character of the charge attempted to be proved, and in many respects he directly contradicted the witnesses. The learned Judge discussed at some length the question as to whose testimony he should act upon, and observed: "It is impossible to avoid seeing and feeling that the more frequently a witness is contradicted by others—although such opposing witnesses contradict him on a separate point—the more is our confidence in that single witness affected, until at length, by the number of contradictory witnesses, we may be induced in effect to disbelieve him altogether. It is difficult to believe that so many are wrong; it is easier to believe that one is wrong so many times; and the more there are who speak against him, the more we are led to believe that he is the one who is in the wrong. . . . The question of veracity does not depend only upon the strength of numbers, nor in some cases does it so at all. Its true basis is character. It is upon the quality of the evidence, and the point is to determine that quality." In the application of these observations in several cases, the determination was against the respondent, although it was expressly stated that if that case stood alone it would have been decided the other way. In one case the learned Judge said: "I would, as I have already said of other charges, decide this against the petitioner if this were the only charge; but as it is one of a series of charges, each one of which is sup-

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ported by a different witness, I do not know what I can do, even in so small, I may say so trivial a matter, unless I give effect to the accumulated weight of testimony, when I have no reason whatever to doubt the truth of the respective witnesses who maintain these charges."

I have found no reported case which deals with this question. On an indictment for perjury, the oath of the defendant, which is charged to be false, is nevertheless, for certain purposes, assumed by the law to be true; that is, to warrant a conviction it is held necessary to have the evidence of two witnesses, or if only one, that "there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness" (per Tindal, C.J., *Reg. v. Parker*, Car. & M. 644). In *Reg. v. Yates*, Coleridge, J., held that one witness was not sufficient to sustain an indictment for perjury; that this is not a mere technical rule, but a rule founded on substantial justice (Car. & M., 139). The facts in *Reg. v. Parker* are worth noting: A debtor had made affidavit that he had paid all the debts proved under his bankruptcy except two, and in support of an indictment for perjury on that affidavit, several creditors were called, each of whom proved the non-payment of a debt due by the debtor to himself, and this was held insufficient. The distinction between a criminal prosecution and the present case is not to be overlooked, but considering the respondent's position as a defendant in this proceeding, there is not only the presumption of innocence of an offence charged against him in his favour, but also the maxim, applicable in civil as in criminal cases, "*semper presumitur pro negante*" (See 10 Cl. & Fin., 534).

The respondent is charged with corrupt practices. There were four cases on which the learned Judge took time to consider, and the second, fifth and sixth were held to be sustained, and the election was declared void. He was in the position of a defendant accused of an offence before a competent tribunal. The presumption of innocence, until his guilt was proved, was in his favour—having denied the charge; the maxim above quoted was in his favour also. The case as put is one of even and fully balanced testimony; each separate charge is supported by only one witness, and is contradicted by the respondent on oath; and, as I understand from the judgment delivered, would have been found against the petitioner if it had been the sole charge, for though the proof adduced by the petitioner sustained it, it was answered and displaced by the respondent's

evidence. It is not asserted that this evidence in rebuttal was untrue, or that the respondent was a man not worthy of belief. I cannot follow the reasoning which makes the fact that several independent charges were, *prima facie*, proved—each by one witness only, and were rebutted, though by him alone—a ground for convicting him of all, for no distinction can be drawn between them. And yet I cannot to my own satisfaction answer the arguments on which the judgments in this and the *North River case* were founded, and I am relieved from the necessity of so doing, as on the other grounds taken, I fully concur in the judgment of my brother Burton.

BURTON, J.—We are fortunately, in this case, not embarrassed with any difficulty as to the credibility of the witnesses, in which event we should probably find ourselves concluded by the finding of the learned Judge who had them before him, and was therefore afforded an opportunity of observing their demeanour and manner of giving their testimony, which we do not possess. Here, however, the learned Judge finds expressly that there was nothing in the evidence of the respondent, nor in the manner of giving it, which could or did excite any suspicion whatever against its perfect truthfulness, whilst in commenting upon the evidence both of Hill and Sufferin, it is clear that he had not formed an equally favourable opinion of their manner of giving their testimony or of their conduct as disclosed by themselves, remarking that the behaviour of the latter, even on his own version of what occurred in conversation with Atkins when going to vote, and his voting against the respondent after voluntarily engaging to support him, had not been altogether creditable; whilst Hill had shewn some feeling against the respondent in giving his evidence.

We have before us, therefore, the learned Judge's views of the way in which the witnesses impressed him, and we have to draw such inference from the whole evidence set out on the record as we think he should have drawn, and find accordingly.

It must, in the first place, be borne in mind that no acts of bribery were established; what is alleged in the two cases of Hill and Sufferin (assuming them for the present to constitute corrupt practices within the meaning of the statute) consists merely of offers or proposals to bribe. It ought also to be made out beyond all doubt that the words imputed to the respondent were actually used, because, as has been remarked in one of the decided cases, when two

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people are talking of a thing which is not carried out, it may be that they honestly give their evidence, but one person understands what is said by another differently from what he intends it. Still more should that be the case when the adverse finding is attended with such highly penal consequences as the Legislature has declared shall follow the infraction of several clauses of the Election Act.

The learned Judge reports that he should have found both these charges disproved if there were no collateral or accompanying circumstances to aid him either way. He finds all the other charges, with the exception of the fifth (to which I shall presently refer), disproved, which should, I venture to think, have some weight.

The collateral circumstance which turned the scale and induced the learned Judge to arrive at a different conclusion, was what occurred at Matthias Hall. The speech there delivered induced him to adopt the case of the petitioners with respect to these two charges also; partly, as he says, "because of the weight of testimony by their united force, and partly because they are to some extent of a like nature with the Matthias Hall charges, resting upon the influence or upon the alleged interest and influence of the respondent with the Government or ministry of the day, which it is," he adds, "not improbable the respondent used as an argument on these occasions, as he unquestionably did on the occasion of the speech."

I can quite understand that a judge or a jury may find their confidence considerably shaken in a witness, whom they were at first inclined to credit, by his being contradicted by a number of witnesses, although each witness speaks of a different subject. Still, after all, it comes back to the question of what credit is to be given to the witnesses.

The judge or jury, under such circumstances, would scrutinise the evidence of the witness with greater care. The maxim of law is, "*ponderantur testes non numerantur*," and, as laid down by Mr. Starkie, no definite degree of probability can in practice be assigned to the testimony of witnesses; their credibility usually depends upon the special circumstances attending each particular case; upon their connection with the parties and the subject matter of litigation, and many other circumstances, by a careful consideration of which the value of their testimony is usually so well ascertained as to leave no room for mere numerical comparison.

I do not understand that there is any conflict of evidence as to what occurred at Matthias Hall; the speech, as proved on both sides, is substantially the same.

The weight of the evidence, then, so far as it is increased by what the learned Judge calls its united force, is confined to the two charges in respect of Hill and Sufferin.

There is a peculiarity about these election cases, that each charge constitutes in effect a separate indictment. It seems to me, therefore, that if, in the opinion of the Judge, there is no sufficient evidence to support the charge, or, in other words, if evidence is given on both sides, and the Judge gives credit to the respondent, and so dismisses the charge, the respondent cannot be placed in a worse position, because a number of charges are submitted, in each of which the Judge arrives at a similar conclusion, or that a limit could eventually be reached where, although his conclusion upon the particular charge in addition to the others would in itself be favourable to him, the Judge should feel called upon by reason of the multiplicity of the charges, in which the respondent's evidence and that of the witnesses opposed to him have been in conflict, to come to an adverse decision by reason of the cumulative testimony which he has previously discredited. To my mind, an accumulation of such acquittals should, if any weight is to be given to it at all, be thrown into the scale in favour of the respondent.

The only two charges in which there is a conflict of evidence are those of Hill and Sufferin. The learned Judge, in the first of these cases—a case dependent altogether upon the witness' precise recollection of the words used and the way in which they were understood—reports his conviction of the perfect truthfulness of the respondent, and that Hill's evidence was given with a manifest bias, and he comes to the conclusion at first to believe the respondent—a conclusion which, from a perusal of the evidence, I should also have arrived at, but in the correctness of which I am further confirmed by two circumstances not referred to by the learned Judge, viz.: (1.) That Hill himself states that he did not regard it as a bribe at the time, but only awoke to the consciousness of there being anything corrupt in it some six weeks afterwards, when it was deemed necessary to bind him down by a statement under oath. (2.) That it was deemed necessary so to fetter him. These two circumstances, apart altogether from the explicit denial by the respondent, carry conviction to my mind that the learned Judge's first impression was the correct one.

In the Sufferin case it is clear that when the alleged conversation occurred Sufferin had avowed his intention to support the respondent, who was aware of the fact, and any promise thus

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made could not have been made in order to induce him to vote or refrain from voting; and this renders Sufferin's version of it highly improbable. He is, moreover, contradicted by two witnesses besides the respondent. Sufferin himself admits, "I was not induced to support him by this offer of the \$3,000 (that is, as to the laying out of \$3,000 on the roads in his township); it made no definite impression on my mind at the time;" and the conduct of this witness was such as not unnaturally to call forth the remark from the Judge, that it was not straightforward dealing, and was calculated, and perhaps purposely so, to deceive. This also, subject to the investigation of the two other charges, he held to be not proved. "But," adds the learned judge, "the other charges, if severally sworn to by a credible witness, and the united effect of their testimony is to overcome the effect of the respondent's unsupported word, I may be obliged to attach such a degree of importance to the combined testimony of these witnesses as to hold the charges to which they severally speak as sufficiently proved in law against the opposing testimony of the respondent."

The learned Judge then proceeded to investigate the remaining charges, holding one of them not proved, and the other, viz., the Matthias Hall speech, is one about which there is no conflict of evidence.

We may assume, therefore, that but for the learned judge's view of that speech he would have disregarded the united force of the adverse testimony; and had he taken the same view of that speech which we are inclined to do, he would not have varied his first decision upon the other charges.

It would seem that both the respondent and his opponent claimed to be supporters of the ministry of the day; but that the respondent claimed to be the recognised ministerial candidate, having been nominated by the Reform party. He claimed further, that his opponent, having originally pledged himself to support him and then come out in opposition, could not expect to retain the confidence of the Government, and that according to his ideas of constitutional practice, the patronage in the constituency would be in his hands, as the ministerial candidate, whether elected or not.

It seems to be admitted on all sides that it was felt to be a grievance of some standing, that strangers were sent up to superintend the work on the roads, and the respondent is said to have stated that whether elected or not he would endeavour to get it remedied. Taken in the most unfavourable view for the respondent,

what he did say, according to Mr. Teviotdale's evidence, was, "He would have the patronage, as he was the choice of the Government, he would have it whether elected or not elected;" adding by way of explanation, as I understand it, "It was the laying out of money on the roads and appointment of overseers."

There is a slight difference between the respondent's version of this speech and that of some of the witnesses; but, taking them in the strongest way against him, I have been unable to convince myself that they constitute a corrupt practice or that they differ substantially from what is constantly done by candidates, in impressing upon electors the importance to themselves of being represented by a ministerial candidate.

The learned Judge holds that such language cannot amount to an offer or promise of any place or employment, or a promise to procure, or to endeavour to procure, any place or employment to or for any voter or other person, within the 1st sec. of 36 Vict., cap. 2, and therein we agree with him; but he holds that it amounts to undue influence within the 72nd section of 32 Vict., cap. 21, or according to the common law.

To prove an offence within that section, it must be shown, either that physical force was used or threatened, or that loss or damage was caused or threatened upon or against some person in order to induce or compel such person to vote or refrain from voting. This was not a threat, nor does it come within the definition of physical force or violence, or doing any loss or harm to any one. Can it then be brought within the remaining words, "in any manner practise intimidation?" To bring the case within this branch of the section, it would, I presume, be necessary to show that some one had been intimidated, but it appears to me to be quite impossible to hold that it comes within this section at all. There was no attempt to work upon the fears of any one; it was rather upon their hopes or expectations; and would come more properly, if an offence at all, within the bribery clauses, but the learned Judge has himself given the answer to that.

Baron Bramwell, in reference to the evidence necessary to bring a case within this clause, is reported to have said: "When the language of the act is examined it will be found that intimidation, to be within the statute, must be intimidation practised upon an individual. I do not mean to say upon one person only, so that it would not do if practised upon two or a dozen, but there must be an identification of

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some or more specific individuals affected by the intimidation, I will not say influenced by it, but to whom the intimidation was addressed, before it could be intimidation within the statute, otherwise it comes under the head of general intimidation."

The suggestion that the offence was one at common law was perhaps sufficiently answered by the statement that no such charge was made in the petition, and that the respondent should not be called upon to meet it. But apart from that, I apprehend it would be necessary to go much farther to sustain such a charge, and to prove that the intimidation is of such a character, so general and extensive in its operation, that people were actually intimidated to such an extent as to satisfy the Court that freedom of election had ceased to exist in consequence; just such evidence, in fact, as would be required to avoid an election on account of an organised system of treating or bribery.

Great latitude is necessarily allowed in speeches of this kind, and to hold an election illegal because of the use of such language as is attributed to the respondent in this case would be to render a law, harsh enough admittedly in many of its provisions, intolerable. What the respondent is alleged to have said was an argument or reason for the electors supporting him rather than his opponent, if they believed his statement that he would be more influential with the Government in securing local benefits, and in redressing the particular grievances of which they complained; but it would be going, in my opinion, far beyond what the Legislature ever contemplated to hold that self-recommendation of that kind on the part of a candidate was to subject the electors to have the election avoided, and to expose him to the disgrace of disqualification for any office in the gift of the Crown, or any municipal office, for eight years.

I think the evidence fails to establish either of the two first charges, and that the remaining charge is not a corrupt practice within the act; and adopting the language of Mr. Justice Willes in the *Lichfield case*,—considering the extreme solemnity and weight which ought to be attributed to an election that has, so far as one can judge, in all its substantialities been regularly and properly conducted,—and looking to the amount and weight of evidence which ought justly to be required to disturb a proceeding of that description,—and looking, I may add, to the highly penal consequences resulting to the respondent, and finding no evidence which, in my opinion, ought to outweigh the denial of

the respondent, and justify me in finding him guilty of the offences charged,—I think we ought not to arrive at a conclusion adverse to him, and that the appeal should be allowed and the petition dismissed.

PATTERSON and MOSE, J.J., concurred.

Appeal allowed and petition dismissed.

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RIVET V. DESOURDI.

Partition—Co-tenants—Occupation rent.

Held, that although one tenant-in-common who has been in sole possession of land owned by him and another is not *prima facie* chargeable with an occupation rent, yet if he claims to be repaid sums paid by him on account of incumbrances, he must give credit for a proportion of the rents and profits.

(May 17, 1876—BLAKE, V.C.)

This was a suit for partition. The bill charged that two of the adult defendants had been in sole possession, and claimed that they should be charged with an occupation rent.

The answer of these defendants admitted that they had been in possession, but denied any ouster of their co-tenants, and claimed by way of cross relief that an allowance should be made to them for incumbrances paid off by them.

McCarthy, Q.C., for plaintiffs, moved for a decree in accordance with the prayer of the bill. He admitted that he was not entitled to charge the adult defendants with an occupation rent if they on their part abandoned their claim to be paid for the incumbrances discharged by them, but he insisted that if they persisted in that claim, he was entitled to a decree as prayed.

Lount, Q.C., for adult defendants. These two claims are entirely distinct; it is not like the case of a claim for improvements made on the land itself. There the tenant in possession has the benefit of those improvements, and it is to be presumed has made them for his own convenience. His right to be repaid for them is a purely equitable right. The payment of the incumbrances is not connected in any way with the possession of the land.

BLAKE, V.C., *held* that although the defendant would not *prima facie* under *Rice v. George*, 20 Gr. 221, be chargeable with an occupation rent, yet, if they insisted on their claim to be repaid the payments made by them in discharge of incumbrances, they must give credit for a proportion of the profits derived by them from the estate.

Decree accordingly.

[Chancery.]

ANONYMOUS—COX V. KEATING.

[Chan. Cham.]

ANONYMOUS.

Solicitor—Order to pay over—Striking off roll—37 Vict., cap. 7, sec. 90 (O).

A solicitor included in his bill of costs rendered to his client, the fees of a commissioner appointed to take evidence, and received payment of such bill, but neglected to pay the commissioner's fees. On the summary application of the commissioner he was ordered to pay over the fees within a month, and in default to be struck off the rolls.

(May 17, 1876—BLAKE, V.C.)

A petition was presented in this matter by one G. G., against a solicitor, to compel payment of a sum of \$450, and in default praying that he might be struck off the rolls.

It appeared from the petition and affidavits that the petitioner had been employed by the solicitor to take evidence in Scotland to be used in a suit pending in Ontario; that his fees as such commissioner amounted to \$450, of which a bill had been rendered to the solicitor; that the latter had drawn upon his client and received payment of a sum sufficient to cover all his costs of the suit in question, including the fees of the petitioner.

W. R. Mulock for petitioner. The application is made under 37 Vict., cap. 7, sec. 89 (O); and see *Re Carroll*, 2 Chy. Cham. 323; *Re Walker*, 2 Chy. Cham. 324; *Re Toms and Moor*, 3 Chy. Cham. 41; *Re Atkin*, 4 B. & Ald. 47; *Ex p. Bodenham*, 8 Ad. & E. 959; *Re Knight*, 1 Bing. 91; *Re Hill*, L. R. 3 Q. B. 543.

Bethune, Q.C., for respondent. The respondent has not received the fees in question in privity with the petitioner. It is the case of an ordinary debt, and there is no jurisdiction in this court to enforce payment by summary process of this kind. The matter stands in the same position as the ordinary case of *Sheriff's fees*, which are included in an attorney's bill, and of which he has obtained payment. It could never be intended to bring such cases within the act referred to.

BLAKE, V.C.—It appears on the affidavits, and is not denied, that the respondent has received from his client sufficient money to pay the costs of the suit referred to in the petition, including the petitioner's fees; here the client was liable for the payment of these fees, and he has placed in the solicitor's hands money for the purpose of enabling him to pay them, and instead of paying them, the solicitor has put the money in his pocket. I have no doubt that such a case is a non-payment of money within the meaning of the act. The money must be

paid within a month, and in default the respondent must be struck off the rolls. The respondent must pay the costs of the petitioner.
Order accordingly.

CHANCERY CHAMBERS.

COX V. KEATING.

Replication—Introduction into replication of matter by way of confession and avoidance—Order 151.

Replication held irregular which contained new matter by way of confession and avoidance of the defence set up by defendant's answer. Such matter should be introduced by way of amendment to the bill.

(February 15, 1876—BARNES.)

This was a suit for specific performance by a vendee against his vendor. By the third paragraph of the defendant's answer, it was alleged that by the terms of the contract the plaintiff covenanted to pay the purchase money on the 1st October, 1875, and that the same had not been paid. The plaintiff, in his replication, admitted this allegation, and set up certain facts in excuse for his default. He alleged in effect that he attended the defendant and was prepared to pay the purchase money, and that he did not do so because he found an incumbrance outstanding on the property, which the defendant refused to remove. The defendant in his answer alleged that the petitioner had executed and registered a mortgage on the property, and he claimed, by way of cross relief, that in the event of the sale not being carried out, the plaintiff might be ordered to release the lands from the mortgage so executed by him. In his replication, the plaintiff admitted the making of the mortgage, but he set up that he afterwards procured it to be discharged.

Hoyles, for the defendant, now applied to take the replication off the files for irregularity, or to strike out the new matter thus introduced by way of confession and avoidance of the facts alleged in the answer.

Perkins (Beatty, Miller & Lash) for the plaintiff. The matter objected to is within the meaning of Order 151, which provides that admissions in the replication may be made, "with such qualifications as may be necessary or proper for protecting the interests of the party making the admissions."

MR. HOLMESTED.—I do not think that this replication complies with, or is within the spirit of Order 151. The system of pleading which prevails in this court aims at producing an issue between the litigants, in the course of at

most three pleadings, viz., bill, answer and replication, or in certain cases, in bill and answer or demurrer alone. There is no provision in our procedure for any fourth pleading after replication, as there is at law; consequently the result of alleging new facts by way of replication would be to deprive the defendant of any opportunity to answer them even to take issue upon them. It has always been the practice heretofore, where it was desired to meet the defence set up by an answer by the allegation of facts in confession and avoidance, to introduce such facts by way of amendment to the bill. The defendant has then an opportunity of answering the facts so introduced.

The qualifications with which admissions may be made in the replication are not such as introduce new matter, but are only such as may be thought necessary for restricting the admission within certain limits, e.g., that the admission is made for the purpose of the suit only, or that it is made with reference only to a certain specified part of any given paragraph of the defendant's answer.

This replication must be set aside with costs, the plaintiff to have leave to file a new replication within ten days.

NOTES OF CASES

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

WYLD V. LIVERPOOL, LONDON & GLOBE INSURANCE COMPANY.

(May 6, 1876.)

Appeal to Supreme Court—Allowance of bond—Practice.

Appeal to the Supreme Court from the Court of Appeal.

The appellants, on a two days' notice of motion, moved for the allowance of the appeal bond and the settlement of the case on appeal. The motion came on to be heard within thirty days after the pronouncing of the judgment appealed from. The execution of the bond was proved by affidavit and the sureties justified in the usual manner. The notice of motion informed the respondent of what the proposed case in appeal would consist. It was objected

that the case itself had not been served; that no information as to the bond was given in the notice, and that the notice had not been given early enough under sections 23 and 28 of the Supreme Court Act.

Moss, J., allowed the bond and case, as stated, as sufficient, but said that the respondent might have an enlargement if necessary to inquire into the sufficiency of the sureties.

Order for appellant.

J. A. Boyd contra.

COMMON LAW CHAMBERS.

IN RE MCKENZIE AND RYAN.

(April 18).

Division Courts—Jurisdiction—Splitting cause of Action—Unsettled account over \$200, but under \$400—39 Vict., cap. 15, sec. 2.

The plaintiff, in a suit in a Division Court, brought before the passing of 39 Vict., cap. 15, sued for \$30 due as a balance of an account for board for self and horse, which appeared at the trial to be a balance of an unsettled account exceeding \$200. He also sued for \$82 for board for self and horse for a subsequent period, and abandoned the excess of \$12 over \$100. On objection being taken to the jurisdiction of the Division Court, the Judge allowed an amendment; and the plaintiff then altered his claim, reducing it to the \$82 only, and the case was again tried and judgment reserved, whereupon application was made for prohibition.

HARRISON, C. J., *held*, 1. That the Division Court had not, independently of the 39 Vict., cap. 15, sec. 2, jurisdiction; but

2. That under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was therefore no necessity for any amendment.

W. R. Muloch shewed cause.

Meyers supported the summons.

IN RE HURST, AN INSOLVENT.

(April 18).

Insolvent Act of 1875, sections 125, 128, 130, 133—Appeal—Fraudulent preference.

Appeal, under section 128 of Insolvent Act of 1875, from decision of County Judge of Halton.

On the 11th September Martha Hurst, and Richard Hurst, her husband, made a chattel mortgage to the Dominion Bank to secure a previous indebtedness of Richard Hurst to the Bank. No future day was named for the payment, and the proviso to hold possession till default was struck out. A writ of attachment in insolvency was issued against Richard Hurst on the 4th October, 1875, and the assignee took possession of the mortgaged chattels then in the debtor's possession. The Bank claimed the chattels under the mortgage, which the assignee contended was void as against the creditors. The Bank thereupon petitioned for an order directing the assignee to deliver up the goods. It appeared also that the debtor had long previously been embarrassed; that most of his paper was under protest; that his real estate was also mortgaged to the Bank and others, and no pressure was shown to obtain the mortgage, and no promise of any future advance. The Judge in Insolvency declined to grant the order petitioned for, holding the mortgage void under sections 130 and 133.

HARRISON, C.J., under these circumstances, after an elaborate review of the English and Canadian authorities bearing on the subject, held, that the chattel mortgage was fraudulent and void as against creditors, and dismissed the appeal with costs.

A. Campbell for appellant.

E. G. Patterson contra.

IN RE DIXON V. SNARE ET AL. EXECUTORS.

(April 21, 1876.)

County Court Jurisdiction—Prohibition.

The plaintiff endorsed his writ in a County Court suit for the amount of account rendered, \$611.90, less credit by contra account of \$561.97, and claimed a balance of \$49.93. The defendant applied for a prohibition on the ground that the County Court had no jurisdiction. It was sworn by the plaintiff, but denied by the defendants, that there had been a settlement of accounts from time to time.

HARRISON, C.J.—Until the Judge of the County Court has heard the evidence and decided as to the facts involving the question of jurisdiction, prohibition cannot be granted. If, on the trial, he should find in favour of defendant's contention, the plaintiff might accept a verdict of \$200 in settlement of his account of \$611.90; but that would not prevent the defendant from suing for his account of \$685.37,

and the plaintiff could then only set off his judgment for \$200.

Bigelow & Hagle for plaintiff.

Oster contra.

SCHNEIDER V. AGNEW ET AL.

(May 2, 1876.)

Con. Stat. U. C., cap. 24, section 41—Examination of debtor—Refusal to answer—Committal.

HARRISON, C.J., ordered the defendant, a judgment debtor, to be committed to the common gaol of his county for three months, for not making satisfactory answers on an examination, under above statute, respecting property which was liable to satisfy the judgment.

Oster for execution creditor.

Ritchie contra.

UNITED STATES REPORTS

DISTRICT COURT, DAKOTA.

RUSSELL B. GROSS V. JAMES W. EVANS ET AL.

Purchaser in good faith—Unrecorded quit-claim deed—Subsequent quit-claim deed—What title it conveys.

1. PURCHASER IN GOOD FAITH.—That in order to defeat a title under a prior unrecorded deed, the subsequent purchase must be in good faith, without notice, and for a valuable consideration.
2. TITLE BY SUBSEQUENT QUIT-CLAIM DEED.—The owner of a lot of land executed a quit-claim deed of it to a party in good faith; after the execution and delivery of this deed, and before it was recorded, he made another quit-claim deed of the same land to another party, conveying all his interest in the land, with covenants against the acts of the grantor, which deed was recorded first. Held, that the grantor by the first deed as between the parties passed all the interest he had in the land, and this, although it was not recorded; that the grantee in the second deed only took the interest which the grantor had in the land at the time of the execution of the deed, and having conveyed it away, he had no interest in the land to pass by the second deed; that the covenant against the acts of the grantor in the second deed did not affect the result in this particular.—

[*Chicago Legal News*, 1876, p. 333.]

The opinion of the Court was delivered by BENNETT, J.

This action is brought by plaintiff to quiet his title in and to the following described real estate, situated in the county of Minnehaha, Dakota territory, to wit: The south-east quarter of section nine (9), in township one hundred and one (101), of range forty-nine (49), and to

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[Dist. Ct. Dakota.

remove a cloud from its title caused by certain deeds executed and delivered to defendants for said real estate, and which were by them placed on record.

The land in controversy was entered by what is known as Indian half-breed scrip, in the name of Jane L. Titus.

Plaintiff claims title under deed, quit-claim in form, executed by Moses S. Titus and Jane L. Titus, his wife, to Byron M. Smith, dated March 21st, 1869, filed for record in Minnehaha county, May 14, 1872, and deed from Byron M. Smith and wife to plaintiff, dated April 7, 1870, and filed for record in Minnehaha county, May 8, 1875.

Defendants claim title under two certain deeds executed by Jane L. Titus and Moses S. Titus, her husband, in form quit-claim, with special covenants, one dated May 17, 1871, and filed for record May 23, 1871, and the other bearing date August 11, 1871, and filed for record September 18, 1871, and deed from Defendant Evans to Defendant Burbank, warranty, for the north half of said tract, executed September 2, 1871, and filed for record in Minnehaha county, October 4, 1871.

The deeds from Jane L. Titus and Moses S. Titus to Evans, and from Evans to Burbank, were executed and delivered subsequent to, but recorded before, the deeds to Smith, and from Smith to plaintiff, and defendants in their answers allege that they purchased for a valuable consideration, and without notice, either actual or constructive, of plaintiff's rights, and claim that they should be protected.

The deed from Jane L. and M. S. Titus to Evans, dated May 17, 1871, as before stated, is in form of a quit-claim: "By these presents, I, Jane L. Titus, do bargain, sell, release and quit-claim, all my right, title, interest, claim or demand

to have and to hold the above quit-claimed premises, so that they, the said party of the first part, their heirs or assigns, shall not have any right, title or interest, in and to the above said premises."

The second deed to Evans, dated August 11, 1871, is the same in form, with the exception of the covenants, which are as follows: "And the said party of the first part, doth covenant with the said party of the second part that they have not made, done, executed, or suffered any act or thing, whatsoever, whereby the above premises, or any part thereof, now, or at any time thereafter, shall or may be imperilled, charged or incumbered in any manner whatsoever." For what purpose was this second deed obtained? The evidence furnishes no explanation;

it certainly was not for the purpose of correcting any mistake in the names of the grantors or grantee, or description, or in the certificate of acknowledgement. The only apparent purpose seems to have been to obtain different covenants, such as would rebut any presumption of notice that might be implied from a quit-claim deed, and clothe the transaction in the garb of good faith, but it falls far short of accomplishing that end, and is in itself a very suspicious circumstance.

In order to defeat a title under a prior unrecorded deed, the subsequent purchase must be in good faith, without notice and for a valuable consideration.

One other point in connection with these deeds to Evans remains to be noticed. Being in form quit-claims, what right, if any, did Evans acquire under them as against the prior unrecorded deed of Smith? It is well settled that a quit-claim deed is sufficient to pass whatever right or title the grantor may have in the land. But it is insisted by counsel for plaintiff that if the grantor has parted with his title, then the grantee in a subsequent quit-claim deed can not be regarded as a purchaser of the same premises, in good faith and without notice, although the prior deed is unrecorded, and he has no other notice of it than that presumed from the form of his deed. The first intimation we have of this doctrine, so far as my examination extends, is as far back as 1818, in the case of *Brown v. Jackson*, 3 Wheaton, 450, in which the Court says: "A conveyance of the right, title and interest in land is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance; but it passes no estate which was not then possessed by the party." The doctrine which seems to have evolved from this decision is stated in the syllabus: "But as the earliest deed was operative between the parties if the second deed purports to convey only the right, title and interest which the grantor had at the time of its execution, it does not convey anything to the grantee."

Following this is the case of *Oliver v. Platt*, decided by the same Court in 1844, and reported in 3 Howard, 396. On page 410 the Court uses this language: "Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or

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his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona fide* purchaser for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts." As late as 1870 the same Court, in the case of *May v. Le Claire*, 11 Wallace, 232, uses the following language: "On the 27th of July, 1859, Dessaint conveyed by a deed of quit-claim to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this was so or not, having acquired his title by a quit-claim deed, he cannot be regarded as a *bona fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey," and cite in support of this doctrine, in a foot note the case of *Oliver v. Platt*. These cases have been assailed, and it is urged that the case of *Oliver v. Platt*, when properly understood and construed, holds no such doctrine. But it will be observed that the U. S. Supreme Court so construes it, and it is also understood and cited as authority on this point by the Supreme Court of the State of Alabama, which says: "The case of *Oliver v. Platt*, 3 Howard. (U. S.) 410, which is cited with approval in 11 Alabama, 1067, fully sustains us in the position that the bank, holding a mere quit-claim deed, cannot be regarded as a *bona fide* purchaser for a valuable consideration without notice."

Smith heirs v. Bank of Mobile, 21 Alabama, 124. This Alabama case is cited with approval in support of the same point, by the Supreme Court of Texas, in the case of *Rogers v. Burcharil*, 34 Tex., 441.

The Supreme Court of Maine, in the case of *Bragg v. Paulk*, 42 Maine, 502, lays down the doctrine that "a deed which simply purports to pass the right, title and interest of the grantor will not exclude the operation of a prior unregistered mortgage." "By a deed which, from its terms, conveys only the right, title and interest of the grantor, the grantee does not obtain anything which the grantor had previously parted with, although the subsequent deed was first recorded."

This doctrine is clearly laid down by the Supreme Court of Minnesota, in the cases of *Martin v. Brown*, 4 Minn., 282; *Everest v. Ferris*, 16 Minn., 26; *Marshall v. Roberts*, 18 Minn., 406, and other cases to which I have not

access. It is contended by counsel for defendants that the Court bases these decisions on particular statute of that state, which reads follows: "A deed of quit-claim and release, the form in common use, shall be sufficient pass all the estate which the grantor could lawfully convey by deed of bargain and sale." It is true that the Court seems to hold that the statute is a limitation upon the estate passed by a quit-claim deed, and yet it is but virtually an embodiment of the principle laid down by other courts in the cases above cited. If, indeed, it conveys all that a party could lawfully convey by a deed of bargain and sale, what more can possibly be claimed for it independent of a statute? This view seems to be borne out by section 479 of our civil code.

But it is further contended that this view is in conflict with the provisions of our recorded act, and definition of a conveyance, which is substantially the same as the Minnesota statute.

This objection is satisfactorily answered by the Court in the case of *Marshall v. Roberts*, *supra*. "These provisions, as will appear upon a moment's reflection, so far from militating against the views expressed in the cases cited, come to their aid, since it is only the purchaser of some real estate, or any portion thereof, who, by his priority of record cuts out the title of a prior purchaser. For when the second purchaser obtains by his quit-claim deed only what the grantor had (his right, title and interest) at the time when such deed was made, he is not a purchaser of the same real estate, (or any part thereof,) which his grantor had previously conveyed away, and therefore no longer has."

I am therefore inclined to hold to the doctrine laid down in these cases. My attention has not been called to any conflicting opinion where the point has been fairly raised and passed upon. And I am further of the opinion that the special covenants in these deeds to Evans do not change their character or vary the rule.

Burbank cannot stand as a *bona fide* purchaser without notice. But be this as it may, it will apply the doctrine laid down in the case of *Marshall v. Roberts*, *supra*, Burbank took nothing under his deed from Evans, as Evans had nothing to convey, and the terms of the quit-claim deed to Evans was notice to Burbank of the rights which had been conferred on Smith Titus' prior grantee. The Court therefore balances the equities of this cause with plaintiff, and finds the deeds to defendants are fraudulent and void as against him.

CORRESPONDENCE.

CORRESPONDENCE.

Assimilation of the Law of Real and Personal Property.

TO THE EDITOR OF THE CANADA LAW JOURNAL.

SIR,—Although I agree with you that the assimilation of the law of real and personal property in every particular is impossible, I cannot help thinking that a much greater difference exists between these two branches of law than either the nature of things, or the exigencies of modern society require.

The principal cause of the dissimilarity lies in the different law of succession applicable to the two classes of property, and this difference of succession again appears to arise from the fact that, as regards personal estate, we have adopted the principles of the civil law; while as regards realty, we have adopted and perpetuated the principles of the ancient feudal law.

Now, I do not think it can be said that there is anything in the nature of either personal property or land which of itself necessitates a different mode of succession. In ancient times the exigencies of society were considered such as to require the application of different principles of succession. But the state of society now-a-days is so essentially changed, and its needs and obligations are so widely different from what they were when feudal principles first took root in our jurisprudence, that the perpetuation of those principles in this age strikes one with a sense of incongruity, somewhat similar to that with which we behold the man in armour at a Lord Mayor's show.

The feudal principle, for all practical purposes, is dead, and is no longer applicable to the state of society in which we live, and in perpetuating this diversity of descent or succession, which is the product of feudalism, are we not running counter to the spirit and necessities of the times?

I think it must be admitted that, according to modern principles of morality, a law of succession must of necessity provide for the due application of the property of a deceased person in the first place for the satisfaction of the claims of creditors upon his estate. This principle

the feudal law practically ignored, and it is only by a species of patch-work legislation of comparatively recent date that this obvious defect has been to some extent remedied. With regard to personal estate, on the other hand, this fundamental principle has always been recognised. And all the patch-work that real property law has undergone has failed to make it as efficient or as consonant with common sense as the simple rules by which personal estate is regulated.

Let us examine for a moment some of the many difficulties and anomalies which this adherence to the feudal principle of succession occasions.

1. The fact that land descends to the heir instead of the personal representative to be administered, leads to this anomaly: that the person who is charged by the law with the payment of the debts of the deceased has no power to deal with one of the chief assets of the deceased's estate, the result frequently being that estates cannot be administered to the best advantage.

2. Then we have this illogical result: a creditor recovers judgment against the personal representative, and upon this judgment issues execution against the lands of the deceased, notwithstanding the fact that the person against whom the judgment is recovered has nothing whatever to do with those lands, and notwithstanding that the person who, in the eye of the law, is the real owner of them, is no party to the proceedings.

3. The difference in the mode of succession necessitates a different rule of construction being applied to instruments affecting lands to that applied to instruments affecting personalty. The result of this has been, that great injustice in the name of law has been frequently done, and the intention of devisors has been over and over again defeated.

4. Then, again, it gives rise to many difficult questions in the administration of estates, which would otherwise rarely, if at all, arise, *e.g.*, questions as to which class of property is the primary fund for payment of debts, &c.; whether there has been a conversion of goods into land, or *vice versa*; whether a fund is pure or impure personalty or realty. If the persons entitled to both funds were identical it is needless to say that these questions

CORRESPONDENCE—FLOTSAM AND JETSAM.

would, for the most part, cease to be material.

5. It keeps alive the law of entail. The only useful (?) result of which is to serve as a sort of pit-fall for unwary conveyancers.

6. It leads to great and unreasonable trouble and expense, where a man, having contracted to sell lands, or being a trustee thereof, dies intestate without having conveyed, and leaving numerous heirs, or when such heirs are unknown or infants, &c. If lands devolved in the same way as personalty all these difficulties would be obviated.

7. It tends to keep alive the anomalous estates of dower and curtesy—I call them anomalous because they place the right of husband and wife—without there being any express contract—paramount to the claims of creditors; a principle wholly at variance, I conceive, with the fundamental rule with which we set out.

8. Then it gives rise to infinite trouble and expense in proving the intestacy and heirship of persons through whom a title is derived, and this trouble and expense frequently falls upon some unfortunate vendor, long after the event has happened, which he is called on to prove.

9. By reason of the silent operation of the law of descent of realty, *i.e.*, without the intervention of any formal act of the law, such as is the grant of administration to personalty, heirs-at-law are enabled to sell the land of an ancestor in fraud of his creditors.

I do not pretend to have exhausted the topic. I think, however, I have said enough to show that the difference in the law of succession involves serious and practical evils, which would be to a great extent, if not altogether, removed by assimilation.

G. S. H.

*Can. Stat. U. C., cap. 88, Sec. 24. —
Judgments—Limitations.*

TO THE EDITOR OF THE CANADA LAW
JOURNAL.

DEAR SIR,—Would you kindly give me a little information on the subject of judgments?

C. S. U. C., cap. 88, sec. 24, is as follows: No action, &c., shall be brought to recover any sum of money secured by mortgage, judgment or lien, or otherwise charged upon, or payable out of land, &c., but within twenty years, &c.

At the time of the passing of this Act judgments were not a charge on land unless registered. Would this Act then have applied to any judgment not registered, or would such a judgment not have remained good after twenty years?

The late Ontario stat., 38 Vict., cap. 16, sec. 11, uses the same words. As judgments are not a charge on land, would this Act affect any judgment whatever?—Yours truly,

A LAW STUDENT.

[Perhaps some of the many enterprising students in Ontario will give their brother the benefit of their research in this matter.—Eds. L. J.]

FLOTSAM AND JETSAM.

THE EMPRESS OF INDIA.—The following is the much discussed proclamation on this subject. It may be interesting to inquire whether writs and documents in this Dominion should not run under the new title:

“VICTORIA R.

Whereas an Act has been passed in the present session of Parliament, entitled “An Act to enable Her Most Gracious Majesty to make an Addition to the Royal Style and Titles appertaining to the Imperial Crown of the United Kingdom and its Dependencies,” which Act recites that, by the Act for the Union of Great Britain and Ireland, it was provided that after such Union the royal style and titles appertaining to the Imperial Crown of the United Kingdom and its dependencies, should be such as His Majesty by his royal proclamation under the Great Seal of the United Kingdom should be pleased to appoint: and which Act also recites that, by virtue of the said Act, and of a royal proclamation under the Great Seal, dated January 1, 1801, our present style and titles are “Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith;” and which Act also recites that, by the Act for the better government of India, it was enacted that the Government of India, theretofore invested in the East

FLOTSAM AND JETSAM.

India Company in trust for us, should become vested in us, and that India should thenceforth be governed by us and in our name, and that it is expedient that there should be a recognition of the transfer of the Government so made by means of an addition to be made to our style and titles; and which Act, after the said recitals, enacts that it shall be lawful for us, with a view to such recognition as aforesaid of the transfer of the Government of India, by our royal proclamation under the Great Seal of the United Kingdom, to make such addition to the style and titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies, as to us may seem meet; we have thought fit, by and with the advice of our Privy Council, to appoint and declare, and we do hereby, by and with the said advice, appoint and declare that henceforth, so far as conveniently may be, on all occasions and in all instruments wherein our style and titles are used, save and except all charters, commissions, letters patent, grants, writs, appointments, and other like instruments, not extending in their operation beyond the United Kingdom, the following addition shall be made to the style and titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies; that is to say, in the Latin tongue, in the words: "Indiæ Imperatrix;" and in the English tongue in these words: "Empress of India."

And our will and pleasure further is, that the said addition shall not be made in the commissions, charters, letters patent, grants, writs, appointments, and other like instruments, hereinbefore specially excepted.

And our will and pleasure further is, that all gold, silver and copper moneys now current, and lawful moneys of the United Kingdom, and all gold, silver and copper moneys which shall, on and after this day, be coined by our authority, and with the like impressions, shall, notwithstanding such addition to our style and titles, be deemed and taken to be current and lawful moneys of the said United Kingdom; and, further, that all moneys coined for and issued in any of the dependencies of the said United Kingdom, and declared by our proclamation to be current and lawful money of such dependencies, respectively bearing our style or titles, or any part or parts thereof, and all moneys which shall hereafter be coined and issued according to such proclamation, shall, notwithstanding such addition, continue to be lawful and current money of such dependencies respectively, until our pleasure shall be further declared thereupon.

Given at our Court at Windsor, the twenty-eighth day of April, one thousand eight hundred and seventy-six, in the thirty-ninth year of our reign.

God save the Queen."

Dr. Kenealy is now elaborating a scheme for combining in his own person the functions of all the law courts, local, national and international. "Before long," he modestly says, he will establish a "High Court of Arbitration," to which all persons who have differences may resort "if they think proper." The persons who thus think proper will "simply have to enter into an agreement to abide by the award of Dr. Kenealy, the judge." He observes very pointedly that "this award will be legally binding on both parties." Although the costs are to be almost nominal, "justice will be fairly and honestly administered." Parties may argue their own case, but "counsel will not be allowed to appear." We would recommend the learned Doctor to read and perpend the case of *The Queen v. O'Connell and others*.—*Ex.*

SCOTCH LAW COURTS.—Most people know the irreverent and slovenly way in which the oath is administered to English witnesses. The witness hurries into the box, and while judge and jury and the spectators are chatting and rustling in a pause of the business, the clerk of the court hands him a small Bible, which he holds in his right hand. The officer then recites his mumbled formula—"The evidence you shall give to the court and jury, touching the matter in question, shall be the truth, the whole truth, and nothing but the truth. So help you, God!" The witness, without uttering a word, ducks his head and puts his lips to the Bible cover—unless he is cunning and ignorant enough to evade the ceremony by kissing his thumb. Now in Scotch courts the procedure is far more dignified and impressive. When the witness appears, the Judge himself rises from his seat, and raising high his right hand, looks fixedly on the offerer of the evidence, who, as instructed, also raises high his right arm, and looks the Judge in the face. The Judge then, amid general silence, calls the witness to say aloud after him—"I swear by Almighty God to speak the truth, the whole truth, and nothing but the truth!" No paltry symbol is added to the simple solemnity of this declaration, which appears likely to be far more binding on the conscience of him who makes it before the Judge and in the silence of the crowded court.—*Leisure Hour.*

LAW SOCIETY, HILARY TERM.



LAW SOCIETY OF UPPER CANADA.

OSGOODE HALL, HILARY TERM, 39TH VICTORIA

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

The names are given in the order in which the candidates entered the Society, and not in the order of merit.

- No. 1350.—JOHN WILLIAM FRONT.
HERBERT CHARLES GYNN.
JONAS RICHY METCALF.
ARTHUR GODFREY MOLSON SPRAGUE.
ROBERT GREGORY COX.
EDWARD DOUGLAS ARMOUR.
No. 1356.—ALBERT ROMAIN LEWIS.

And the following gentlemen received Certificates of Fitness:

- E. GEORGE PATTERSON.
ROBERT FRANKSON.
JAMES LEITCH.
ROBERT GREGORY COX.
THOMAS COOKE JOHNSTONE.
EDWIN PERRY CLEMENTS.
WILLIAM MYDDLETON HALL.
EDWARD DOUGLAS ARMOUR.
ALBERT ERNEST SMYTHE.
HEBER ARCHIBALD.
JAMES CARRUTHERS HEOGLER.
GEORGE ATWELL COOKE.
DAVID LENNON.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates.

- WILLIAM EGERTON PERPUN.
JOHN MORROW.

Junior Class.

- SAMUEL JOHN WEIR.
FRANK EGERTON HODGINS.
WILLIAM WHITE.
DANIEL EMANT'S SHEPPARD.
WALLACE NESBITT.
JAMES B. MCKILLIP.
JAMES MORRISON GLENK.
J. STANLEY HUFF.
MICHAEL A. MCHUGH.
ERNEST V. D. BODWELL.
HUGH D. SINCLAIR.
JAMES WILLIAM ELLIOTT.
ROBERT CANNIDY.
DUNCAN CHARLES PLUMER.
WILLIAM AVERY BISHOP.
FRANCIS ARTHUR EDDIS.
JAMES GARRUTT.
JOHN CHARLES COFFRE.
JAMES HIDDILL.
HOWARD JENNINGS DUNCAN.

Articled Clerk.

- JOHN A. STEWART.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—namely, (Latin) Horace, Odes, Book 3; Virgil, Aeneid, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Caesar, Commentaries, Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3; Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams' Equity, Smith's Manual; Common Law, Smith's Manual; and respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise on Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 18, Statutes of Canada, 29 Vict. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding:—Russell on Crimes, Broom's Legal Maxims, Lindley's Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen's Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,

Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR AUGUST.

1. Tues.. Slavery abolished in British Empire, 1834.
6. SUN.. 8th Sunday after Trinity. Prince Alfred born, 1844.
9. Wed.. Imprisonment for debt abolished in England, 1844.
12. Sat.... Candidates for Attorney to leave papers with Secretary of Law Society.
13. SUN.. 9th Sunday after Trinity. Sir Peregrine Maitland Lieut.-Governor, 1818.
15. Tues.. Primafy examination.
16. Wed.. Detroit surrendered to the British, 1812.
20. SUN.. 10th Sunday after Trinity.
21. Mon.. Long vacation ends.
22. Tues.. Intermediate Examinations.
23. Wed.. Last day for setting down rehearing in Chancery.
24. Thur.. Examinations for admission. Candidate for call to pay fees.
25. Fri.... Examinations for call.
27. SUN.. 11th Sunday after Trinity.
28. Mon.. Trinity term begins.
31. Tues.. Rehearing term in Chancery begins.

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THE
Canada Law Journal.
Toronto, August, 1876.

WE reprint from the *Times* the judgment of the Court of Queen's Bench in England in the *cause celebre* of *The Queen v. Plimsoll*. Curiously enough this case has not been reported elsewhere, and as it is not always easy to obtain a file of *The Times*, it seemed desirable to transfer the judgment to our columns. *The Queen v. Plimsoll* is the leading authority on the question as to when the Courts will grant criminal information for libel, and was referred to by the counsel for the defendant in the case of *The Queen v. Wilkinson* now before our Court of Queen's Bench for adjudication.

A CORRESPONDENT draws our attention to the following advertisement in a country paper:—

Geddes & Grier, conveyancers, notaries, &c., Meaford and Thornbury.

Mr. Geddes, Solicitor, will be in Thornbury on Saturday in every week, when parties requiring his professional services will find him at Mr. Grier's office.

Money to lend on real estate, mortgages bought and sold. GEDDES & GRIER.

Our informant states that Mr. Geddes is an attorney, but that Mr. Grier is a "self-dubbed conveyancer, &c., lately a farmer, but now in full blast as 'Lawyer Grier,' to the great injury of the profession here. Mr. Geddes has an office here, and attends once a week at Thornbury to give colour to Grier's pretensions." What the exact arrangement is between the parties we are not informed, nor is it material; but it is material that a solicitor should take what is in our opinion a most unprofessional and improper mode of increasing his business. This is one of the things that the Benchers, now that their attention is drawn to it, should take up and apply a remedy. If their powers in this and cognate matters are too limited, they should be extended so that

EDITORIAL ITEMS—MULTIPLICATION OF REPORTS.

a reasonable protection may be given to those whose interests it is their duty to protect, within the limits of their jurisdiction.

ON enquiring recently about the chances of some modern conveniences being supplied to those who spend portions of their life at Osgoode Hall, we were told that it was hoped that arrangements would soon be made for the building of a Court House in rear of the Hall, when all would be "made pleasant," but that at present there was no place large enough even to hold a wash-hand basin. This may be so, but we doubt it. We venture to suggest that even that difficulty might be overcome by an effort on the part of some of our many excellent benchers. We could not, of course, expect a lunch room, but we should be happy during the summer to subscribe towards a pump with a trough to be "thereto attached;" the tail of a "stuff" would answer for a towel; and a tin cup might, without much additional expense, be hung on a chain and fastened to the pump with a staple, for fear it might suffer the fate of several valuable text books now missing from the library.

BORN in England and the United States litigants are clamouring for more judges. Business is terribly in arrear in the Supreme Court of the latter country, there being some 900 cases now in arrear, and with the present staff the evil is rapidly on the increase. In England things are not quite so bad, but the arrears are assuming gigantic proportions notwithstanding the recent changes in the administration of justice. With us the Court of Common Pleas has heard all the cases on their paper. Their brethren in the Queen's Bench have had a vastly larger share of work to do and have been struggling manfully to master it. It may be necessary in some way to turn over to the

judges of the former Court some of the rules in the latter. It always happens that a larger amount of miscellaneous business finds its way to the Bench than the Pleas.

WE spoke last month of the Winslow Extradition case. We are glad to be able to refer to the following very sensible remarks on the subject in the *Albany Law Journal*, one of the best of the legal journals in America. Strange as the assertion may seem, there *really* are some people in the United States whose moral sense is not blighted, and who know what is right and are not afraid to own it. If a few more were so to assert themselves, they would soon raise the character of what might be, and in some respects is, a great nation:

"The course of our government and our courts in regard to the trial of extradited criminals is calculated to discourage future improvements in the law of extradition, if not to compel other governments to abandon treaties already in existence between them and us. The government of Great Britain refuses, it is said, to surrender Winslow until our government shall give some guaranty that he will be prosecuted only for the offence for which extradition is procured. This is, as we have frequently maintained, entirely just and reasonable; nevertheless, our Department of State, with characteristic blindness to the new and better views of international intercourse, refuses bluntly to comply with this condition of Great Britain. Now, the treaty of 1842, which contains the provisions relating to extradition between Great Britain and this country, has no limitation of the kind indicated. But, if there is any common-law of nations, we should suppose that it would supply the deficiency. If our government refuse to comply with the condition that an extradited person shall be tried only for the offence for which extradition is procured, we do not believe that we shall long be able to maintain extradition treaties with other governments at all. In this connection it may be well to notice that Judge Benedict has decided that Lawrence, whose extradition was procured from England, may be tried for any offence whatever, irrespective of the manner in which he was brought into the jurisdiction of the courts. We repeat, that, if such counsels are to prevail in

MULTIPLICATION OF REPORTS.

the Department of the State, and such opinions in the courts, we shall soon find that no government will care to keep up extradition relations with us."

MULTIPLICATION OF REPORTS.

It is related of Lord Wensleydale that he considered a judgment imperfect if it did not refer to every case in the books that bore on the question in controversy. In a similar vein, Lord Mansfield said in *Rex v. Wilkes*: 4 Burr. 2549: "I never give a judicial opinion upon any point until I think I am master of every material argument and authority in relation to it." It was possible for these judges, living at the time they did, to give practical effect to their views. But now-a-days, such is the multiplication of reported decisions, that judges are inclined to enunciate very different opinions. For example, in one of the suits in the European arbitration, Mr. Fischer, Q.C., having cited cases decided by the Master of the Rolls and Lord Cairns in the Albert arbitration, Lord Westbury said he would, out of deference to the authorities cited, reserve his decision. At the same time, he remarked that nothing was so miserable in our law as the existence of any number of reported cases which might be cited in support of almost any proposition, reminding him of the saying that a certain person could quote Scripture for his own purpose.

While our system of law remains as it is, uncodified, subject to yearly expansion by legislative addition and modification, which is in turn interpreted, and sometimes only made intelligible by judicial decision, it is simply impossible to avoid the necessity of an interminable issue of reported cases. This being assumed, the best method of minimizing the difficulty of mastering the law is by ascertaining and adhering to some well-defined rules in the determination of what cases shall be reported. The vast multiplication of the volumes of reports which it is neces-

sary for a Canadian lawyer to consult fills the mind with consternation. First of all, there are our own Common Law and Equity series, the practice cases, the decisions in appeal, and the new series presently to be issued of the judgments of the Supreme Court at Ottawa. Then, as the Dominion Statutes are common to all the Provinces, there will be decisions of the courts of one Province which the practitioners in the other Provinces cannot afford to overlook. Then there are, of course, all the reports of decisions in the English courts, which of themselves involve no small amount of labour and time to overtake. Besides all this there seems to be, both in the mother country and here, a hankering after decisions in the United States courts, which necessitates an overhauling of their multitudinous volumes, where certainly cases can be found going to support every possible view of every possible subject of litigation.

But, as touching cases which alone should be published, it has been well said that there are two classes of cases which are worthy of being reported. *Firstly*, cases which decide a new point or principle, such as those which settle the meaning of a statute which has not yet received a construction, where such construction was really doubtful in the absence of decision; or which lay down the rule of expediency to be applied to some new combination of elements in social, commercial or political existence, which the course of events brings forward. *Secondly*, cases, which though they do not decide absolutely new points or principles, nevertheless afford typical illustrations of the application of old points or principles to large or frequently recurring classes of instances.

Many lawyers, and even judges, advocate the printing of all judgments, the reasons of which have been written out by the judge. But we think it is not every considered judgment which should be reported. Every unconsidered judg-

MULTIPLICATION OF REPORTS—MUSKOKA ELECTION PETITION.

[Ontario.]

ment should certainly not be reported. And every judgment, whether considered or not, which is given without reasons, should not be reported. Such is the opinion of Jessel, M.R., in *Fitzgerald v. Chapman*, 24 W.R. 131. No doubt it is well for judges to state or write out the reasons which influence them in coming to the conclusion which they do arrive at, and this for the main reason so well expressed by Lord Eldon in *Wright v. Ritchie*: 2 Dow. 383, in which he says: "If pronounced by a judge from whose decision there lay an appeal, counsel and the advisers of parties had an opportunity of weighing well the grounds of the decision; and when the matter came to the court of last resort, where the principles were settled which must regulate the decisions of inferior tribunals, it was their duty to consider all the principles to which facts in all their varieties might afterwards be applied." But it would be a grand mistake to report all such cases where the decisions are mere repetitions of former cases, or where the conclusion depends upon the particular facts of the case.

It is well to have a record of all cases decided such as is supplied in England by the Weekly Notes, and such as is being and will be supplied here, we trust, by the Notes of Cases published from time to time in this journal, under the direction of the Law Society. But it would be a mere accumulation of useless matter to insist that every such judgment should be reported *in extenso*.

One grievous fault in many reports is the lack of condensation, especially in the statement of facts. The Common Bench reports, as issued under the auspices of Mr. Scott, are notable illustrations of this vice, and he is not without imitators in some of the Ontario Reports. Another fault is the entire absence of any statement of facts, except what is to be collected from the references and allusions in the judgment. The facts of the case should be succinctly stated, and separated

from the judge's decision upon those facts. To borrow the quaint admonition of Sidney Smith: "The reporter should think on Noah, and be brief. The ark should constantly remind him of the little time there is left for reading; and he should learn, as they did in the ark, to crush a great deal of matter into a very little compass."

CANADA REPORTS.

ELECTION CASE.

(Reported by HENRY O'BRIEN, Esq., Barrister-at-Law.)

SOUTH ONTARIO ELECTION PETITION.

ABRAM FAREWELL, (*Petitioner*) *Appellant*, v.
NICHOLAS W. BROWN, (*Respondent*) *Respondent*.

32 Vict. cap. 21, sec. 66—*Treating*.

Held, 1. That the above section is limited in its effect to tavern-keepers, &c., who alone can sell or give liquor so as to avoid the election. *DRAAPER, C.J.*, dissented, holding that sec. 66 extends to all persons who sell or give liquor in a tavern.

2. That the words of the section "Municipalities in which the polls are held," and "within the limits of such municipality," are not confined to the municipality in which are held the polls at which the voters who are treated are entitled to vote. The prohibition extends to the selling or giving liquor within the limits of any municipality of the Riding in which a poll is being held, irrespective of the person to whom the liquor is sold or given.

[January 23, 1876.]

This petition was tried before Mr. Justice Wilson, at Whitby, on May 11th, 12th and 13th, 1875. He gave judgment dismissing the petition. From this judgment the petitioner appealed.

The first ground of appeal was, that the keeper of the hotel called 'Ray's hotel,' in the town of Whitby, was guilty of a corrupt practice in giving spirituous or fermented liquors at his tavern on the day of polling, and during the hours appointed for polling, to divers persons, and that the respondent was present when liquor was given as aforesaid and consented thereto.

In the particulars delivered this charge was formulated thus: "That the respondent, on the said day of polling, and during the hours appointed for polling, gave spirituous and fermented liquor to and drank with divers electors, to the petitioner unknown, at Ray's hotel, in Whitby." Their Lordships declined to entertain this as a ground of appeal, as the allegations therein differed in a material point from the charge in the particulars, and it was not

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SOUTH ONTARIO ELECTION PETITION.

[Ontario.]

enquired into or adjudicated upon, nor did the evidence seem to support it.

The other grounds of appeal were :

2. That the giving of spirituous or fermented liquor in a certain tavern in Oshawa on the day of polling, and during the hours appointed for polling, by Francis Clarke to one Jordan, referred to in the said judgment, was a corrupt practice which avoided the respondent's election.

3. That W. H. Thomas, referred to in the said judgment, was an agent of the respondent, and that the said W. H. Thomas was guilty of a corrupt practice in giving liquor to divers persons at Oshawa, in Hallett's hotel, on the day of polling, and during the hours appointed for polling.

4. That Frank Gibbs, referred to in the said judgment, was an agent of the respondent, and that the giving of liquor by the said Frank Gibbs to divers persons in a tavern at Oshawa, on the day of polling, and during the hours appointed for polling, was a corrupt practice.

The facts as to the second charge above set out, and known as Clarke's case, sufficiently appear hereafter in the judgment of the learned Chief Justice of Appeal.

James Belhune for the appellant.

Hector Cameron, Q. C., for the respondent.

DRAPER, C. J.—I have doubted the correctness of the decision in Clarke's case, and am not sorry to find that the learned Judge had also a considerable degree of doubt, as I should not, unless upon the clearest conviction, depart from his deliberate opinion.

The facts seem to be as follows : One Jordan was a voter, whose residence was in Whitby, and who was a voter in that municipality. During the time of the election he was working in Oshawa—both places, though separate municipalities, being within the electoral division of South Ontario. Clarke, whose agency appears to be sufficiently proved, went to Oshawa on the polling day to bring Jordan up to vote at Whitby, and treated him in an hotel at Oshawa to a glass of whiskey. This was held not to be a violation of the 66th sec., because the liquor was not given by Clarke to Jordan within the municipality in which the poll for the town of Whitby was held. No question was asked as to the hour when this treating took place—no doubt suggested as to its being within the hours appointed for polling, i. e. from nine a.m. to five p.m. Considering that to make this treating a corrupt practice, which, if committed by an agent without the actual knowledge and consent of the candidate, would avoid the election, it cannot have been over-

looked at the trial, and as the evidence shows that Clarke drove from Whitby to Oshawa to get Jordan ; that Clarke had told him when they had got to his (Jordan's) own place that he could stop there and go down after dinner and vote ; and that no point has been suggested on either side that the treat was or was not within the hours appointed for polling, I shall assume it to have been so.

I have already expressed my opinion upon this section in the *Lincoln case*, but I avail myself of this opportunity to add a few observations.

So far as keeping peace and good order at elections is concerned, it can make little difference, as between two coterminous wards or municipalities, in which of them persons who commit a breach of the peace drank the liquor which overcame their discretion and influenced their disorderly proceedings. The distance between municipalities in which polls are being held at the same time may be such as to render quite unnecessary any provision against dangers to arise from the prohibited cause, and ought to repel the idea that the Legislature had the prevention of any such danger in their contemplation. But it would be little, if at all, less absurd to hold that treating voters in municipality A, who being excited to lawlessness and influenced by liquor, went into adjoining municipality B, where they created a disturbance, would not be within the mischief intended to be prevented by the Act, as if the tavern in which the liquor was given to them was in municipality B.

Further ; I see nothing in sec. 66 which makes the fact that the person to whom liquor is given is or is not a voter an element in the matter prohibited, that is, selling or giving to any person within the limits of such municipality. There is no necessity that a man should be a voter to make selling or giving liquor to him on the polling day an offence subject to penalty. In Jordan's case, if he had not been a voter, giving liquor to him in a tavern in Oshawa would have been a violation of the law, assuming as I do that the day in question was appointed for holding the polls in the municipality in which the tavern stood.

I think we surmount most of the difficulties suggested by holding that section 66 is confined to the regulation of hotels, taverns and shops in which liquors are ordinarily sold. On the day appointed for polling they must be kept closed under a penalty. No liquor must be sold or given to any person in any such hotel, &c., on the polling day. The words, "within the limits of such municipality" may perhaps be

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SOUTH ONTARIO ELECTION PETITION.

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redundant, but the word *such* confines the construction to the municipalities mentioned in the former part of the section, which may, I think, be properly treated as part of the description of the hotels, &c., which are to be kept closed, namely : of hotels, &c., situate in "the municipalities in which the polls are held."

Adopting this conclusion, I am of opinion that Clarke was an agent of the respondent, and did, in violation of section 66, give spirituous liquors to one Jordan in a tavern in Oshawa, which was a municipality in which a poll was held on that day, appointed for the polling, and within the polling hours, and that the election was therefore void and should be set aside with ease.

My brothers consider section 66 of the Act of 1868 does not affect any person except the keeper of the hotel, tavern or shop, who is subjected to a penalty in three cases :

1. Not keeping the hotel, &c., closed.
2. Selling liquor (in his tavern, &c.,) during the polling day.
3. Giving liquor in his tavern, &c., during the polling day.

The whole three are made corrupt practices if committed during the hours appointed for polling. I hope the Legislature will remove the doubts by a clear statement.

BURTON, J.—[After referring to the charge spoken of in the first ground of appeal.]

The three remaining charges, assuming that in all or some of them the agency is established, are charges of giving liquor in a tavern by an agent within the hours appointed for polling, and involve the necessity of our placing a construction upon the language of the much-debated 66th section of the Election Act of 1868.

We had occasion to consider this section before in the *North Wentworth* and *North Grey* cases, and then held that there having been a clear violation of the section by the hotel-keeper, which was made a corrupt practice by the Act of 1873, and that corrupt practice having been committed with the knowledge and consent of the candidate in each case, there was no alternative but to declare the election void and the candidates disqualified. But it is contended on the part of the petitioner that the latter part of this section is general in its terms, and is not to be restricted to the parties aimed at or intended to be referred to in the first part, viz., the keeper of any hotel, tavern or shop in which spirituous or fermented liquors or drinks are ordinarily sold—but extends to any person within the municipality, and that the penalty imposed is confined to the offence of selling or giving referred to in that portion of the section.

The clause in question, with several others, having for their object the preservation of peace and good order at elections, is to be found in the 22nd Vict., cap. 82. That to which this section corresponds was consolidated in the Consolidated Statutes of Canada, cap. 6, as section 81, and ran thus : "Every hotel, tavern or shop in which spirituous or fermented liquors or drinks are sold shall be closed during the two days appointed for polling in the wards or municipalities in which the polls are held, in the same manner as it should be during divine service; and no spirituous or fermented liquors or drinks shall be sold or given during the said period, under a penalty of \$100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives any spirituous liquors or drinks, as aforesaid."

So far there would have been no room for doubt, but in re-enacting this section, in the Election Act of 1868, the words relating to the period of divine service are omitted; the words "to any person within the municipality" are added after "gift," and instead of affixing a distinct penalty upon the keeper for neglecting to close, and another penalty upon him for selling or giving, the clause concludes, "under a penalty of \$100 in every such case." If these words have the effect of extending the penalty to each case of omitting to close a tavern, hotel or shop, as well as to each case of selling or giving, there would be no good reason that a wider signification should be given to them when read in connection with the later part of the section than the former. The *party liable* to the penalty for *omitting to close* must be the keeper. Why should they be construed as extending to *every person* when read in connection with the remainder of the section? My own view is that the new enactment is in substance the same as the former one. It is impossible to believe that if the Legislature had intended to effect so sweeping a change, they would have left it to be inferred, or as a question for argument, instead of making it clear by the insertion of a few words. It would be such a mistake that, in the language of Mr. Baron Bramwell, it would be an imputation upon that body to suppose it.

It is true, that for omitting to close the hotels there could be only the one penalty—the offence being complete whether kept open for one hour or for the whole day—whilst each separate sale or gift would, I presume, constitute a separate offence: *Brooke qui tam v. Milliken*, 3 T.R. 509.

I can see no good reason for holding that the

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Legislature intended to confine the penalty to a portion only of the offences enumerated in the 66th section, or for holding, as suggested by Mr. Justice Gwynne, that the whole, viz., the *keeping open and the sale*, should be regarded as but one offence, complete only in the event of spirituous liquors being sold or given. In *Newman v. Brudyshe*, 10 A. & E. 11, a conviction for keeping open the house, for selling beer and for suffering the same to be drunk and consumed in the house, was held bad, as including three several offences in one conviction, for which the defendant might have been distinctly convicted.

It is said that if it had been intended to limit section 66 to hotel and shop keepers it would have been easy to have so expressed it. To my mind it is so expressed—the first part of the section over-riding and being the key to the whole. But if there is any doubt or ambiguity I have already intimated my opinion that in the construction of statutes it is not to be presumed that the Legislature intended to make any innovation upon the Common Law further than the case absolutely requires. The law rather infers that the Act did not intend to make any alteration other than what is specified, and beside what has been plainly pronounced; for if the Parliament had had that design, it is naturally said they would have expressed it. It is further argued, however, that the word “give” indicates an intention to extend the Act to other parties beyond the keepers of hotels, but it must be borne in mind that that word is to be found in the original Act, where the penalty was unquestionably restricted to the keeper of the hotel, &c., and, as Mr. Justice Gwynne suggests in the *Lincols* case, was probably added to prevent the possibility of the party proceeded against for the penalty evading the statute by setting up as a defence that he did not sell but gave the drinks.

But there is an additional reason for concluding that the Legislature did not intend to effect so sweeping a change under a section which purports in its introductory clauses to deal only with hotels and shops where spirituous or fermented liquors are sold. In such a case we may fairly refer to and examine other parts of the Act for the purpose of ascertaining the intent of the Legislature. On referring then to the 61st section, we find that the candidate, or any other person, is authorised to furnish drink or any other entertainment to any meeting of electors, even on the polling day, at his or their usual place of residence. Here, then, we have a clause in the same statute expressly permitting what another section, in as express terms, prohibits, if the construction contended for by the petitioners be the correct one.

Now that the elections are all held in one day, a literal compliance with the first portion of the 66th section would be impracticable, there being no such exception as is to be found in the English Acts in favour of the reception of travellers, and in the amendment to the Act that has just been introduced, I see that it has been omitted; but, whatever may be meant by closing a hotel on the day of polling, it is directed, and the failure to do so made a distinct offence.

I will refer only to one other matter which confirms me in the opinion that in the construction of this clause we should give no further effect to the words than they clearly and unmistakeably bear, which is this: The Legislature, in what is popularly known as the Dunkin Act, has declared that no prohibitory law shall be passed by any municipal councils without the consent of the ratepayers, and, whilst declining to pass such a law themselves, have left it in the power of the ratepayers to make such an enactment. Are we to suppose that they intended inferentially to pass such a law, even for a limited period, when they re-enacted a clause which, when first passed, applied only to hotel and shop keepers selling spirituous and fermented liquors.

For these reasons I am of opinion that the person, and the only person, liable to the penalties imposed by the Election Act of 1868 is the hotel or shop keeper, or person acting in that capacity; that he, and he alone, is the person who is guilty of a violation of the Act, by selling or giving liquors, and so liable under the Act of 1873 to the additional penalties imposed by it if within polling hours; and whilst the investigation of this case has more fully confirmed me in the conviction of the correctness of the decision of the Court, which declared that a violation by the hotel keeper of this section, with the knowledge and consent of the candidate, avoided the election and entailed the penal consequences affixed by the statute, I am not prepared to hold that the agent of the candidate is guilty of a corrupt practice in treating at a hotel within the prohibited hours. To do so would be in effect to hold that there could be two penalties for the same offence, when the statute has imposed only one.

My conclusion, therefore, is that there has been no violation of the 66th section within the meaning of the Act of 1873.

PATTERSON, J.—[After stating the case and referring to the first ground of appeal as being removed altogether from their consideration].

The other grounds of appeal charge as violations of section 66 the giving of liquor to various persons by agents of the candidate during

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the hours of polling, the persons in each case being treated by the agents at a tavern ; but the agents not being the tavern-keepers, but merely casual guests.

In this respect the three charges are precisely alike. The questions peculiar to each case are those touching the fact of the agency and the places where the drinking took place.

It is contended by the appellant that under section 66 the giving of spirituous or fermented liquors by *any person* to any other person during the day appointed for polling is made penal, and, by the Act of 1873, is a corrupt practice. On the other side, it is insisted that the section applies only to those who sell or give in the character of keepers of a hotel, tavern or shop in which spirituous or other fermented liquors or drinks are ordinarily sold. It seems to me that we must either construe the clause literally, and give their full effect to the words "no spirituous or fermented liquors or drinks shall be sold to any person ;" or we must read the words with which the clause commences as indicating the class to which the whole clause applies ; and read the clause as if worded to the effect that "no keeper of a hotel, tavern or shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall open his hotel, &c., during the day appointed for polling ; nor sell or give to any person, &c." This was evidently the effect of the clause as it stood in C. S. Can., cap. 6, sec. 81, where it forms, as it does in the Act of 1868, one of the provisions for "keeping the peace and good order at elections."

It is not difficult to suggest reasons why, as a matter of policy, it may be desirable to extend the prohibition against distributing liquor on polling days beyond the ordinary dealer in liquors. We have, however, to enquire whether that has been done, and if so, whether this extension is in any way limited, or whether it reaches all persons in the municipality without regard to the place where liquor may be given, or the purpose for which it may be required.

The consequences which would follow from holding the restriction to be entirely unlimited have been well pointed out by the learned Judge below, and they are of a character so startling that it is impossible to suppose they could have been in the contemplation of the Legislature. And, besides this, the clause, so construed, would apparently be in conflict with sec. 61, which allows a candidate to entertain a meeting of electors at his own house on the polling day.

I believe we are all agreed that this unlimited effect cannot be given to the section ; but his

Lordship the Chief Justice, while he construes the prohibition as extending to all persons, considers that the law is only violated when the liquor is sold or given in a hotel, tavern or shop in which liquors are ordinarily sold. I have not been able to see in the clause itself or in the context anything which imposes this limitation. I cannot find room for any middle course. I think these two alternatives only are presented: Either the keeper of the house alone is aimed at—or the prohibition applies against all persons and to all places within the municipality.

The true view of the enactment in my judgment, is that it is simply a re-enactment of the former law, either without modification or with no modification that points to any more extensive operation, and I think this appears whether we closely examine the clause itself or look elsewhere, as we may do in vain, for indications of an intention to change the law.

All the other clauses in this division of the statute are verbatim re-enactments of the former statute, except that the penalties, while the old amounts are retained, are imposed in terms adopted to avoid any appearance of legislating as to criminal law.

Three changes are made in the section. The first change is the omission of the words which directed that the house should be closed on polling days "in the same manner as it should be on Sunday during divine service"—an omission apparently made because the omitted words were not applicable to any law in Ontario, but which has no bearing on the argument now in hand. The second is the insertion of the words which I quote in italics in the passage, "And no spirituous or fermented liquors or drinks shall be sold or given to *any person within the limits of such municipality* during the said period."

The clause as it stood was, in its terms, general enough to forbid the selling or giving of liquor anywhere in the municipality ; but I have no idea that either the most literal or the most fanciful expounder would have so construed it. Where was the necessity for the words now inserted ? To my mind the reason is plain. The whole section as it stood admittedly applied only to keepers of hotels, &c. The danger was that this part of the section might be read as forbidding only selling or giving *in their houses*, but not the dispensing of liquor outside of their four walls. That doubt is set at rest, and the present section is either simply declaratory of the law as it stood, or modifies it only so far as to make evasion of its intention more difficult, without, by force of the in-

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section of the particular words I am now discussing, otherwise extending its effect.

The third change is in the penal part. It formerly read, "under penalty of \$100 against the keeper thereof if he neglect to close it, and under a like penalty if he sells or gives any spirituous or fermented liquors or drinks aforesaid." It now reads, "under a penalty of \$100 in every such case." The words themselves appear to be only a statement in a general and comprehensive form of what was before expressed in more detail. The argument, however, is because "the keeper thereof" is not now mentioned, an intention is shown not to confine the prohibition as it was before. Let us see where this argument leads to. We have to take the section either by itself, or we have to look at it in connection with and as re-enacting the other. Reading it by itself, and taking two provisions separately, we have *first* this enactment: "Every hotel, &c., shall be closed during the day appointed for polling, in the wards or municipalities in which the polls are held . . . under a penalty of \$100." Whose duty does this make it to close the house? I apprehend there would be a serious difficulty in enforcing the penalty for neglecting a statutory duty unless the statute made it the duty of some particular person. As far as the clause expresses it, the duty may be intended to be cast upon the owner of the house, or the holder of the license, or the actual manager of the business, or the reeve or constable of the township. The answer, of course, will be that there must be a reasonable construction adopted, and that when it is said that an establishment is to be closed, that is equivalent to saying it shall not be opened, and that the person who could otherwise open it is the person intended. It is not my present object to analyse this contention minutely. It might appear on close reasoning that an enactment that a house shall "be closed" is not equivalent to one that it shall "not be opened" or shall be "kept closed," and it might not be found so clear that if a servant opened the house in the absence of his master the master would be liable to the penalty. My object is, in combating the contention that by the omission of the words "against the keeper thereof," the Legislature have relied on a strict construction of the language instead of using an express declaration, to extend to other words an effect which they had not before, to point out that by strictly construing the section, the first part of it would be inoperative, and that if it could be made operative at all, it would be by applying to it a rule of construc-

tion depending partly on presumption, and liable to lead to a wrong conclusion.

We get rid of all the difficulty by looking first at the law as it was, where we find there was no room for doubt. We then enquire, has the law been changed?—and we find that the Province of Ontario having become separated from Quebec, and its Legislature having found it necessary or desirable to re-enact the law relating to elections, did re-enact it, making such changes as the changed constitution required; but indicating no intention to change the law except where that is done in express terms, as, *e. g.*, in adopting the law then in force in England. The passage of the Act in itself does not, under the circumstances, imply an intention to change the law, or to do more than to adapt it to the changed political circumstances of the country. No obstacle exists to prevent the section in question being regarded as meant to be and as being a re-enactment, with only such modifications as I have noticed. When we refer for explanation to the law as it was, we find no difficulty in reading the words, "under a penalty in every such case," as the same in effect as "under a penalty against the keeper thereof, if he neglects to close it, and under a like penalty if he sells or gives."

We have either to take the new section by itself, when we find that one half of it is inoperative, or if operative at all, is only so by some nicety of construction which can never be other than doubtful, or we have to take it as a re-enactment of the old law, when the whole is operative.

I do not think the word "given" as it occurs in the phrase "sold or given" adds much weight to the contention for the more extended construction, as to have prohibited selling only would have been to invite evasion by almost suggesting that the tavern-keeper should distribute the liquor on the pretence of giving it.

I have already said that while satisfied that the section cannot be read as forbidding the giving of the liquor by *any one*, without restriction as to place or purpose, I am not able to perceive any ground, satisfactory to myself, for holding that the restriction may extend to persons, other than the keeper of the house or person acting in that capacity, who give liquor in the house itself when it would not touch them if they gave it elsewhere in the municipality, as in the charges now before us, which are ordinary cases of treating, the person charged as giving did so merely by buying from the bar-keeper, and then by his own hand or the hand of the bar-keeper giving it to others.

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We should have to impute to the Legislature the intention to convey by the one expression two separate mandates, one of which presupposes disobedience to the other. As far as it affects the tavern-keeper, the enactment is that he is neither to open his house nor to sell or give liquor on the polling day. If he obeys this command, no other person can possibly give, on that day, any of the tavern-keeper's liquors. He is to retain his whole stock safely in his own possession. It would seem a faulty rule of construction on which we should hold that the Legislature, in contemplation of the tavern-keeper disobeying the law by parting with liquor, meant to provide against such disobedience by the further command that if he did so disobey, the recipient of the liquor must not give it away again under a penalty, and particularly as no penalty is attached to the act of receiving it. If such an intention existed it should and doubtless would have been somewhat more clearly expressed.

The only other case in which it can be suggested that *giving* at a tavern, &c., is the act intended, is the case of persons bringing liquor from elsewhere to the tavern and giving it away. This is too remote a possibility to require more than a bare mention, and no good reason can be suggested why a giving of that nature should not be an offence wherever committed, as well as when committed in a tavern or place where liquor is ordinarily sold. In my view, therefore, the agents, Thomas, Clarke and Gibbs did not violate sec. 66 by treating at taverns on the polling day.

The same remark applies to a personal charge against the candidate for treating at Ray's tavern, which seems to have been urged below, but which was not renewed before us as one of the grounds of appeal.

It is not necessary for the disposal of the case to dispose of the other questions discussed in the judgment before us, but on two of those questions it is proper that we should express our opinion.

[His Lordship then referred to the agency of Thomas, and agreed with the later opinion of Mr. Justice Wilson, that he was an agent. He then proceeded.]

The other question relates to sec. 66 of the Act of 1868. One Clarke, an agent of the candidate, had treated one Jordan, a voter, whose polling place was in Whitby, at a tavern in Oshawa, during the hours of polling. The learned Judge held that this was not an illegal act within sec. 66, "because the liquor was not given by Clarke to Jordan within the limits of

the municipality where the poll of the town of Whitby was held."

I think this is a mistaken view of the section, and that the mistake has arisen from regarding the prohibition as aimed at the treating of voters; and with that idea, reading the words "municipalities in which the polls are held" as meaning the municipalities in which are held the polls at which the voters who are treated are entitled to vote. I think it is quite plain not only that the object of the enactment, viz. "To preserve peace and good order at elections," would be very inefficiently attained if open house might be kept for all who were not voters of the particular ward or municipality, but that nothing in the section points to that construction. An election is proceeding for the riding; Whitby and Oshawa are two separate municipalities in the riding, and in each a poll is held during the same hours. A tavern-keeper who sells or gives liquor in either municipality is plainly violating sec. 66, whether he gives it to voters of that municipality or to voters of the other municipality, or to persons who are not voters. The prohibition is against selling or giving within the limits of a municipality in which a poll is being held, without any regard to the persons to whom the liquor is sold or given. The decision in Clarke's case is, therefore, upheld—not upon the ground on which the learned Judge rested it—but upon the other ground which I have discussed, viz: that the corrupt act was committed, not by Clarke, but by the person who sold him the liquor.

The appeal should be dismissed with costs.

Moss, J.—[After referring to the charge in the first ground of appeal, and holding that it could not be amended, or the appeal in relation thereto heard].

The learned Judge below, upon a review of the evidence and an examination of the authorities, held, although with much hesitation, that neither Thomas nor Gibbs was an agent by whose treating in taverns the respondent could be affected; but he was manifestly of opinion that if the agency had been established their conduct in giving treats, although not shown to be for the purpose of influencing votes, would have avoided the election. On further consideration he seems to have inclined to the view that agency had been established in the case of Thomas; and I must say that that appears to me to be the proper conclusion from the evidence. In the case of Clarke he decided that agency had been proved, but he thought that his treating was not a corrupt practice within

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the meaning of section 66, for reasons to which I shall refer presently. But it is broadly argued by the learned counsel for the respondent that, even assuming these persons to have been agents, there was no corrupt practice, because section 66 of the Act of 1868 is only intended to deal with the keepers of hotels, taverns and shops in which spirituous or fermented liquors are ordinarily sold, and to prohibit the selling or giving of liquor by persons answering that description. If that be the true interpretation of the section, it becomes immaterial to discuss the evidence of agency. On the other hand, it is contended by the counsel for the appellant that the section is divisible; that while the first part relates to keepers of taverns, &c., alone, the second extends to and renders penal the giving of liquor by any person to any person in the electoral division during polling day; and that consequently, if given by an agent of the candidate during the polling hours, the election is avoided by force of sections 1 and 3 of the Act of 1873 (36 Vict., cap. 2).

The words used are certainly of extreme generality. Read literally they are sufficient to support the appellant's contention. But there are numerous cases in which language quite as wide and terms quite as general have been restricted by a consideration of the previous state of the law, the express object of the statute, and other circumstances which the Courts have held fitting to be regarded in arriving at the intent of the Legislature. [The learned Judge here cited and reviewed the following authorities: *Hawkins v. Gathercole*, 6 D. McN. & G. 1; *Lord Auckland v. Westminster Local Board of Works*, L. R., 7 Chy., 597; *Sedgwick on Statutory and Constitutional Law*, 234.]

These references are authority sufficient, not only for the proposition that we should regard the terms of the enactment for which section 66 was substituted, but that we should presume that the Legislature only intended to change the law to the extent that it has clearly and positively expressed. The 66th section of the statute of 1868 was substituted for the 81st section of the Consolidated Statutes of Canada, cap. 6. In each statute the section forms one of a group collected under the heading of "Keeping the peace and good order at elections." Some doubt has been expressed whether it is allowable to refer to this heading upon a question of the proper construction of one of the sections coming under it. It seems to me that it can be taken into account for the purpose of determining the immediate and special object which the Legislature had in view while passing

these sections, and there is no doubt that the nature of this object may have an important bearing upon the interpretation to be given to language of a general character. In *Bryan v. Child*, 5 Ex. 368, Pollock, C.B., refers to the mode then "recently introduced in statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute;" and he decides that such preamble must be read in order to ascertain the meaning of the Legislature. The so-called preamble was this: "And with respect to transactions with the bankrupt, &c., be it enacted." Our statute may fairly be read as if expressed thus: "For the purpose of keeping the peace and good order at elections, be it enacted," &c. In *Robinson v. Collingwood*, 17 C. B., N.S. 777, the word "trusts" used without any limitation in a statute was construed in the light of the preamble to mean "trusts in favour of the grantor."

It appears, then, that the object which the Legislature had in view when it passed the sections in the Consolidated Statute was the maintenance of peace and good order; and that the object was still the same when the corresponding sections of the statute of 1868 were enacted. According to the principles of construction to which I have referred, we ought not to assume that the Legislature, which, in the associate clauses was re-enacting the former statute, contemplated such a wide extension of the law, as is contended for by the appellant, unless it has used language clearly expressing that purpose. How wide that extension would be is manifest from an examination of the 81st section. There is no room for doubt as to the description of persons who were affected by its provisions. It enacts that every hotel shall be closed, and no spirituous or fermented liquors shall be sold or given during the said period, under a penalty of \$100 against the keeper thereof if he neglects to close it, and under a like penalty if he sells or gives liquor. This language is free from all ambiguity. The persons subjected to a penalty for giving or selling liquor are the keepers of the houses directed to be kept closed. In the statute of 1868 the phraseology is—except in some particulars immaterial to the present argument—precisely the same until the part relating to the penalty is reached. The injunction to keep closed and the prohibition against such a gift are expressed in the same terms in both statutes. If, then, the later statute, passed with the same object as the earlier, and coinciding with it in the corres-

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ponding sections directed to this object, is to be extended from the comparatively narrow circle of keepers of such houses to the general body of the public, it is simply because in the part of the section relating to the penalty there is no definition of the persons who are rendered liable. I entertain little doubt that the draftsmen who penned the 66th section thought that in substituting the words, "under a penalty of \$100 in every such case," for the definite language of the 81st section, he was expressing the same thing in a more concise form. It may be that in aiming at a little originality by this consideration, he has fallen into obscurity; but such things have been known to occur in Acts prepared by skilful and experienced hands.

Regarding the 66th section as it stands, it is necessary to supply by construction the designation of persons whose duty it is to close the houses. The reasonable construction is that these persons are the keepers of the houses. If the words "by the keeper of such house" must be introduced into the first clause of the section it appears to me that they should equally be introduced into the second clause. For my own part, I prefer that construction to one that virtually seeks to introduce into the same clause the words, "by any person." The inconveniences of such a construction, some of which have been graphically described by the learned Judge below, are in themselves sufficient to induce the Court to pause before adopting it.

I do not repeat the other constructions which have been presented by my brothers Burton and Patterson, in confirmation of this view, but content myself with saying that if this be the correct view to take of the section, it follows that it is only violated by the giving of liquor, when the giver is a keeper of one of the houses directed to be closed; and that no agent of the candidate will, by giving liquor to any person within the prohibited hours, be guilty of a corrupt practice avoiding the election, unless he is the keeper of such a house.

I only desire to add that I entirely concur in the remarks of my brother Patterson upon Clarke's case. If his treating Jordan at Whitby, where Jordan was entitled to vote and did vote, would have avoided the election, that would have been the result of the treat he actually gave him at Oshawa. The offence does not depend upon the character of the person treated. It does not matter whether he is or is not entitled to vote at any particular place, or whether he is entitled to vote at all.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

COMMON LAW CHAMBERS.

PETTIT V. MILLS.

Civil right to recover expenses incurred in criminal prosecution—Pleading.

(February 10th, 1876.—MR. DALTON.)

The defendant was found guilty of robbery of a large sum of money from the plaintiff's house, who thereupon brought this action to recover the money so taken, as well as the expenses attending the criminal prosecution, and damages for the trespass. The second count of the declaration was for trespass, and the third set out the facts of the robbery, adding that the defendant had been arrested on the information of the plaintiff, and afterwards tried and convicted, that the plaintiff had expended large sums of money in so bringing the defendant to justice, whereby the latter became liable to the former in the sums so expended.

A summons was obtained to strike out either the second or third count, or for leave to plead and demur to the third count, on the ground that both counts were in trespass, that the third was a count in tort as well as assumpsit, and that expenses incurred under such circumstances were not recoverable.

Muir shewed cause, and contended that as the civil right was suspended until the criminal was brought to justice, the plaintiff necessarily had to expend the moneys he now sought to recover before he could bring the present action, and it would be for a jury to determine the amount: *Reid v. Kennedy*, 21 Grant, 84; *Chowne v. Baylis*, 31 Bea., 351, 359.

Davidson contra.

MR. DALTON.—The count may be a good count in trespass, but not in assumpsit, and either the second or third count must be struck out. It is very doubtful whether the plaintiff can recover his expenses and outlay in this action.

The head note to *Blackman v. Bainton* 15 C. B. N. S. 432, is quaint: "Twenty five witnesses and a horse on one side against ten witnesses on the other. Held not such a preponderance of 'inconvenience' as to induce the Court to bring back the venue from the place where the cause of action (if any) arose."

NOTES OF CASES.

NOTES OF RECENT DECISIONS IN THE
SUPREME COURT OF NEW
BRUNSWICK.

(From PUGSLEY'S REPORTS, VOL. 3.)

*Public agent — Road master — Personal liability—
Where credit given to fund and not to person.*

(April, 1875.)

L. was road master and employed C. to do certain work on a public road, the agreement between them being that the work was to be paid for when L. collected the road moneys. L. went out of office before he collected the moneys.

In an action brought by C. against L. The Court held that the credit was given to the fund and not to the personal liability of the road master.—*The Queen v. Tapley*, p. 47.

*Slander of title—Action on the case for—Necessity of
alleging special damage—Injunction order—Malicious service of—Whether a ground of action.*

(April, 1875.)

The service of a copy of an order of injunction, even though alleged to have been made maliciously, whereby plaintiffs were prevented from selling certain property to the party served, affords no ground for an action, unless there has been some misrepresentation of law or fact.

To maintain an action for slander of title, the words must be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved; and mere words of caution are not enough. There must also be an express allegation of some particular damage resulting to plaintiff from such slander.—*Gordon et al. v. McGibbon et al.*, p. 49.

*Pleading—When words equivocal—Common Law Procedure Act, 1873—Promissory note—Action on
against endorser—Notice of dishonour—What a
sufficient averment of.*

(April, 1875.)

In an action against the endorser of a promissory note, the declaration, which, after stating presentment, contained the averment, that the maker did not pay, "but neglected and refused to do so, of which defendant had notice," was held bad on general demurrer.

In pleading, if the words are equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavourable to the party pleading.—*Bank of Nova Scotia v. Estabrooke et al.*, p. 71.

*Policy of Insurance—Condition that all statement
contained in the application will be taken to be
warranties on the part of assured—Verbal agree-
ment.*

(April, 1875.)

Defendants issued a policy of insurance to plaintiff, insuring his dwelling-house against fire. One of the conditions of the policy required that "all applications for insurance must be made in writing prepared by an authorized agent of the company, and signed by the applicant, or by his authority; and all statements contained in the application, will be taken and deemed to be warranties on the part of the assured."

In the plaintiff's application for insurance he stated that the size of his house was 28x30 feet; that it had been built only about six years; and that it was painted inside and outside. In fact, the size of the house was 24x29 feet; it had been built about thirty years, and was only painted on the inside. The house having been burnt, and an action brought on the policy, the company pleaded these misstatements of the plaintiff as an answer to the action. The plaintiff, in reply to this, pleaded that the company's agent applied to him to insure; that he was absent from home at the time and did not know the exact size of his house, and so stated to the agent, who verbally agreed with him that the statement in the application should not be considered a warranty of the size of the house, and that if it differed from the size stated in the application it should not be considered a misstatement. There was a similar statement with regard to the length of time the house had been built, with this addition—that plaintiff stated to the agent that he believed the house had been built twenty-five or twenty-six years; and also, that he had stated to the agent that the house was painted on the inside only.

Held, on demurrer, That these were no answers to the defendants' pleas; that by the conditions of the policy the statements of the age, size, &c., of the house were expressly made warranties, and that the written contract could not be varied by a mere verbal agreement.—*Dinges v. The Agricultural Insurance Company of Watertown, New York*, p. 80.

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NOTES OF CASES.

[N.B.]

Contract—When made by a number of persons—Severality of interest—Whether contractors can be sued separately—Where contract ambiguous.

(April, 1875.)

Where the interests of a number of parties to a contract are distinct and separate, and a covenant made by them is not unmistakably joint, but ambiguous, they must be sued separately.

Therefore, where T. contracted with A. and eight other persons to raft separately and deliver at a certain place lumber which belonged to them individually, for which the latter agreed to pay 65 cents per thousand; and it was also provided that if any of the parties failed to pay the amount owing by them when due, T. could sell sufficient of the lumber belonging to said party or parties to pay the amount due.

Held, That this was a several contract on the part of A. and the other owners of the lumber and that a joint action would not lie against them.—(*George True and Gideon Stairs v. Atherton et al.*, p. 90.)

Arbitration and award—Improper conduct of arbitrators—Receiving information after close of evidence—Where attorney of one party is employed to draw award—Setting aside—Answering affidavits—Hearsay.

(April, 1875.)

An application, made to set aside an award, was supported by an affidavit of M., against whom the award was made, stating that the attorney of the opposite party had been employed to draw up the award, and he did, as M. was informed and believed, search at the Record Office, after the evidence was closed, and used information obtained there to assist in making up the award, and that the award was not the independant award of the arbitrators. The arbitrators made affidavits in answer, stating that they determined on their award, informed the attorney how they wished it drawn up, and they then read it carefully over and signed it; that they knew nothing of the search of the records, and were not in any way influenced in their decision.

Held, (per RITCHIE, C. J., and ALLEN, WELDON and FISHER, J. J., WETMORE, J., *dissenting*), that this formed a sufficient answer to the charges made, and that it was not necessary for the arbitrators to enter minutely into a specific denial of all the charges set forth in the affidavits on which the rule was granted.

Per WETMORE, J., that the Court having granted a rule calling on the opposite party to

show cause why the award should not be set aside, it was incumbent on him to contradict or satisfactorily explain all the charges put forward, although they were founded on hearsay and belief.

It is not desirable to employ the attorney of one of the parties to draw up an award: but this, of itself, is not sufficient to cause it to be set aside.—*Ex parte Milner; In re Bollenhouse*, p. 96.

Bribery and Corruption and Election Petition Act, 1869—Election—Agency—Whether Parliamentary law of agency in force in this Province—Evidence—Statements of Agent—Whether admissible.

(April, 1875.)

The Common Law of Parliament, or, in other words, the Parliamentary Law of Agency, is in force in this Province, and is to be acted upon in administering the Bribery and Corruption and Election Petition Act, 1869.

A conversation with a witness, or the admission of an agent, had and made on the day of the election, immediately after the close of the polls, is admissible in evidence.—*Duffy, petitioner, v. Ryan and Rogers, respondents*, p. 110.

Statute—Construction of—Where acts relate to same subject matter—Whether those repealed can be looked to in construing similar words in subsequent Act—Pavement—Where meaning given to it by Legislature different from technical sense.

(June, 1875.)

Acts relating to the same subject matter, though repealed, may be referred to for the purpose of giving a construction to similar words used in the subsequent Act.

Where the Legislature by several statutes passed at different times authorized a City Council to make or repair "pavements of stone, deal or plank," and to assess the owners of property benefited thereby for the expenses thereof, and subsequently, by an Act repealing the previous enactments, gave power to make or repair any "flagging or pavement" (omitting words of description), and to make assessments, &c., it was held by the Court that the word "pavement" was not to be understood in its technical sense, but in the sense which had been applied to it by the Legislature in the previous Acts, and that it included either stone, deal or plank.—*Ex parte Lugrin et al.*, p. 125.

Attachment and abolition of Imprisonment for Debt Act, 37 Vic., c. 7, and 38 Vic., c. 4, sec. 1—Whether attachment can issue on contracts made or causes of action arising before passing of Act 37 Vic., c. 7.

(June, 1875.)

An attachment cannot be issued upon a contract made before the passing of the Attachment and Abolition of Imprisonment for Debt Act 37 Vic., c. 7, on the 8th April, 1874.

It is a general rule that a statute shall not be so construed as to operate retrospectively, unless it is expressly made applicable to past transactions, or the words can have no meaning unless such a construction is adopted.—*Smith et al. v. Burks*, p. 130.

Insolvent Act of 1869, section 67—Wages—Privilege—Where servant leaves employment of insolvent before assignment.

(June, 1875.)

A servant who left his master's employ three months before the assignment of the latter, under the Insolvent Act of 1869, is not entitled to be privileged under section 67 of the Act, even though he was obliged to leave the employ because he could not get his pay.—*Ex parte William Napier*; *In re Case*, p. 134.

Replevin—Claim of property—Whether second writ can be issued after finding of sheriff's jury in favour of claimant—Where property in custody of law—Pleading—Costs.

(June, 1875.)

Where, in a declaration of replevin, plaintiff alleged that defendant took and unjustly detained plaintiff's property, it is no answer for defendant to plead that the goods were in possession of C., and that defendant took them under an execution against him; or under an attachment issued under the Insolvent Act—such a plea neither traversing nor confessing and avoiding the plaintiff's allegation.

When defendant in replevin wishes to raise the question that the property relieved was in custody of the law and therefore not repleviable, he should apply to set aside the writ, instead of pleading it as a defence.

Semble, that the finding of a jury under a writ *de prop. prob.* in favour of the claimant, is not conclusive, and plaintiff may issue second writ.

It is doubtful if a plaintiff can reply to defendant's pleas, and afterwards demur to both the pleas and rejoinders.

Where plaintiff inserted six counts in a declaration in replevin for the same property, no costs were allowed except for one count.—*Harrington v. Girouard*, p. 151.

ENGLISH REPORTS.

COURT OF QUEEN'S BENCH.

(Before Blackburn, Quain and Archibald, J.J.)

THE QUEEN V. PLIMSOLL.

Libel—Criminal information—The general principles as to when criminal informations for libels should be granted—Relator occupying a public position—Statements made without malice but beyond limits of fair criticism.

[The Times, June 16, 1873.]

In this case a *rule nisi* was obtained by Mr. Norwood, M.P., for a criminal information against Mr. Plimsoll, M.P., for a libel contained in his well-known book "Our Seamen."

Mr. Norwood was Member of Parliament for Hull and a large ship-owner. The substance of the alleged libel was contained in passages of Mr. Plimsoll's work, which charged that certain ship-owners were in the habit of dangerously overloading their vessels, and otherwise neglecting to provide for the safety of the seamen employed by them; that their fortunes were largely increased by those practices; and that having a personal interest in their continuance, they managed to get some of their number into Parliament, who, in furtherance of their own selfish aims, continually opposed the measures which might be introduced with a view of abating the evil complained of. Mr. Norwood, in his rule, asserted that several of these passages referred to him, and especially complained of statements made by Mr. Plimsoll with reference to a steamship of his (Mr. Norwood's), called the *Livonia*. This vessel, Mr. Plimsoll alleged, was sent to the Baltic with a cargo of railroad iron, five weeks after another ship-owner had declined to take the same cargo, on the ground that the lateness of the season rendered the trip an exceedingly dangerous one. It was further charged that the ship was loaded with nearly 1,600 tons, though she was only 872 register, and that being what is called a spar-decked vessel, in which case the main deck should have been over two feet above the water-line—it was two feet ten inches below that level. After making these statements, Mr. Plimsoll made the following comment: "And this vessel so loaded was sent off to the Baltic in November, or five weeks later than the same freight had been refused by Mr. James Hall, of Newcastle-upon-Tyne, on the ground that it was too late in the season to send a ship without imminent

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peril to the lives of the seamen. Of course she was lost. . . . She was insured, of course." Particular exception was taken by Mr. Norwood to the last quoted expression, which he considered to imply that he had overloaded the ship so as to get the insurance. He also denied by affidavit the correctness of Mr. Plimsoll's statement as to the *Livonia* in many particulars, and in general terms asserted that he was entirely innocent of the charges made against him. The further facts of the case sufficiently appear in the judgments of Mr. Justice Blackburn and Mr. Justice Quain. The facts and arguments of counsel are very fully reported in the *Times*, but it is unnecessary to give them more at length.

Mr. Serjeant Parry, Mr. Butt, Q.C., and Mr. Lewis, for Mr. Plimsoll, showed cause.

The Attorney-General (*Sir John Coleridge*), *Sir John Karslake, Q.C., Mr. Watkin Williams, Q.C., and Mr. Charles Bowen* supported the rule.

The judgment of the Court was delivered on Saturday, June 14, 1878.

BLACKBURN, J.—I think in this case my brother Parry would have had a right to reply on the affidavits which have been put in in answer, if they affected our view of the matter; but, as they do not, it is not necessary that he should reply upon them; and therefore we must pronounce our judgment on the facts brought before us.

This is an application for a rule for a criminal information on the ground of libel, and in dealing with that this Court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the Court in granting the rule for a criminal information. I think there are two things principally to be considered in dealing with such an application; the first is to see whether the person who applies to conduct the prosecution—the relator or the informer—I think the common expression is the "relator"—that the person who applies for the rule has been himself free from blame, even though it would not justify the defendant making the accusation; and the other is to see whether the offence is of such a magnitude that it would be proper for the Court to interfere and grant a rule for a criminal information. Both those things have to be considered, and the Court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been com-

mitted, but also—exercising their discretion as men of the world, I may say—in judging whether there is reason for a criminal information or not. I think it is an old expression, generally attributed to Lord Tenterden, but I believe of much older date, that as far as the opinion of a Judge is concerned he should not have a discretion, but that there should be fixed rules for him to go by in exercising his judgment. We have no fixed rules to go by here, and we do not like it; but, nevertheless, in this case we are obliged to exercise our discretion, and to exercise it with considerable latitude, otherwise I think the system of having criminal information would produce no good at all. Now, turning to this charge, and seeing the libel here, which is produced before us, it is certain that Mr. Plimsoll has written a book, and it is equally certain that he is agitating the matter before the public, and inquiring into the way in which vessels were sent to sea, particularly as to overloading and undermanning, and also as to insuring. He is agitating with a view on his side to get an amendment of the law on the subject, he entertaining the view that it required an amendment of the law. With that view he had a perfect right to take whatever course and whatever steps he thought proper in order to bring the matter before Parliament, and in doing so he had a right to comment on the facts or supposed facts which came before him; and as long as he did it *bona fide* and fairly he is perfectly right and does not transgress the law; but the moment he goes beyond *bona fide* and fair comment, and makes attacks upon private persons for which he has no ground, then he does transgress the law, and he does become the object of proceedings being taken against him for the libel, either upon criminal information, or by action, as the case may be. Now, in the present case I think there can be no doubt Mr. Plimsoll has considerably exceeded what would be right, or what he is justified or excused in from the facts which he has brought before us against Mr. Norwood, and the question whether the magnitude or amount is enough to justify us in granting a criminal information is one with which I have had the greatest difficulty from the beginning to the end of this case; but we must see at present how much of the existing matter is correct which is made out against Mr. Norwood, and then we must see how much is left over which would justify us in granting a rule for a criminal information. Now, many matters are quite clear. The *Livonia* was built in 1865 by Mr. Laing from a design of his, and built, as he says, according to

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what Mr. Norwood then required; that Mr. Norwood required and intended that she should carry 1,800 tons dead weight, and Mr. Laing says that he built her to carry 1,800 tons dead weight in fulfilment of Mr. Norwood's requirements. She was built, and is called a "spar-decked" vessel, but it appears that the description of a spar-decked vessel which Mr. Plimsoll had taken from the Lloyd's Rules did not exist at that time; and though the vessel was a spar-decked one, yet that the portion of her sides under the spar-deck were altogether stronger than the Lloyd's Rules required, and that the vessel was altogether a stronger vessel than was required for a spar-decked ship; and in that state of things she was sent to sea by Mr. Norwood, who seems to have loaded her at different times with nearly 1,800 tons of cargo, but not quite, and she does not seem to have met with any misfortune until the time that this disaster happened. Now, that occurring, Mr. Norwood does, in the month of September, 1869, enter into a contract or a charter-party, in which he engages this vessel to take 1,600 tons of railway iron to the Baltic; in fact, she loads a cargo of 1,600 tons, or the merest trifle within 1,600 tons, of railway iron and coals, and with that she does not leave the port of Sunderland until the 2nd of November, 1869. Therefore, she starts on a winter voyage across the German Ocean to the Baltic with that quantity of iron on board; and that, I think, is uncontroverted. She does go out, and after being seven or eight hours at sea, one of the engines breaks down or gives way—and I may say that the giving way of that engine in that way is in no way connected with the overloading—but when the engine gives way and the ship is disabled, she does fall into the trough of the sea and becomes unmanageable, and after drifting from the 2nd of November, as the Attorney-General has truly said, till the morning of the 5th. She finally, on the morning of the 5th, sinks and goes down. That is the mode in which she goes down. If the weather was blowing a hurricane, or anything of that sort, that might have accounted for her going down without her being overloaded, but if the weather was fine or moderate it is scarcely possible to conceive, if she were not overloaded, that she should become so unmanageable that they should be obliged to abandon her and that she should go down; because when steamers are despatched on a voyage the parties must contemplate the possibility that the engines may be disabled, and if that be so, she must not be so loaded that the weight will be so much that the vessel will become un-

manageable in the event of any accident arising to the engines. It must be recollected that she was crossing the German Ocean and going to the Baltic. My impression is that the worst part of that voyage would be before she reached the Baltic, at all events in November, when she would be pretty sure to meet with rough weather. If her engines were disabled, and she was not able to act with her sails, and she was loaded in such a way as that in moderate weather she became unmanageable and went down, I should say she was overloaded in that state of things. Now, I must see whether she was overloaded; but before I go into that, I must go to the conclusiveness of fact that we draw, looking at the affidavits. I think I may state now that the result of the skilled evidence is this—that although, I think, it is made out that this vessel was stronger than what is commonly called a spar-decked ship, and although the rule of 1870 about spar-decked vessels was not then in force, yet I think, according to the ordinary rules by which vessels are loaded, and which are expressed in Lloyd's Rules of 1851, that "No vessel bound on any over-sea voyage should on any account be loaded beyond that point of immersion which will present a clear side out of the water when upright of three inches to every foot depth of hold amidships from the height of the deck at the side to the water." Now, treating this vessel as being stronger than an ordinary spar-decked ship, I do not think it is quite made out to my mind that she was a ship of which the upper deck was a main deck, and, consequently, that this rule should apply, and I think, according to the calculations which have been made, applying that rule which says that she ought to have three inches of clear side to every foot depth of hold, she ought to have had at least 6ft. 3in. of clear side, and I think all the witnesses go to that extent. Not only is that the rule which all the witnesses lay down, but that is the rule and practice; and not only that, but Mr. Harrington, who is the skilled witness on that subject, makes out that if a vessel, according to his calculation as to displacement, had the quantity of cargo on board that is mentioned she would draw 19ft. 9 in., I think it is, and consequently she would have 6ft. 3in. of freeboard—that is, taking it in that view, that would be the extreme that she would be drawing—19ft. 9in., which would be just on the very edge of this rule. Now, on the evidence of this part of the case I really have no doubt at all. We have evidence that the vessel, lying in the dock at Sunderland, when loaded was measured. She was lying loaded in the dock

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at Sunderland, ready to go out. Lying there in that state, the draught which she had fore and aft would be such that everybody could measure it to the tenth of an inch—certainly to an inch. The log, in the handwriting of the mate, who is since dead, as far as regarded that, has been found and produced, and it appears there that the mate wrote down that the depth she drew when loaded was, aft, 21ft. 3in., and forward, 19ft. 6in. That is the statement that the mate makes, and which one can see no reason to doubt he could make accurately; and there is no reason to doubt he did make accurately. The dock master, when applied to as to what time it was safe for the vessel to go out, told us in his affidavit that, being informed her draught was 21ft. 3in., and it being considered what amount of draught it would be safe to take her out with, "being informed of that, then looked to see what was her draught of water for going out, and found that she was 21ft. 3in. for her going out." It is agreed by all the witnesses, that, to enable her to go over the bar, a quantity of coal and iron had been taken out with a view, not of lowering her forward, but with a view of raising her aft, so as to enable her to go over the bar; and, that being so, the pilot is paid for 21ft of water, which was what the hinder part was reduced to. But we have it in addition to that, that when the affidavits were made before the Receiver of Wrecks, when the captain and mate came home, both of them said she went out drawing 21ft. on an even keel; and taking all that mass of evidence together, we must take it as established that the vessel had so much coal and iron on board that she did go out of Sunderland Dock drawing 21ft. of water on an even keel; and, consequently, according to Mr. Harrington's own view, she was 1ft. 3 in. deeper than she should have been; and every one seems to agree that that was too heavy a load to send in the vessel on any voyage, and therefore too heavy a load to send in the vessel on such a voyage as this across the German Ocean. Now, as to the protest, I do not dwell on that; it certainly looks suspicious in the absence of the log, when there was time to take the log out of the ship. It is true, it is to be assumed in their favour that, being out only three days in this state, and being all very much engaged—and I think it is agreed that the captain and mate had not been in bed during this time—it is true that the log may not have been written up; but it is contrary to the custom that when they had time to take the log out of the ship they did not do so. But I do not think we should

rely too much upon that. On the part of Mr. Norwood, it is said the reason of the loss was the breaking down of the engine, which is certainly a very sensible reason in the absence of anything else, and if the weather was severe as is represented. But the question is whether the loss was to be attributed solely to the breaking down of the engine. I think the state of the weather, as contrasted with the other evidence, was rather exaggerated. The short note which was made by the engineer of the state of the weather, does not represent the true state of the weather. It is not till the 3rd that it approaches anything like heavy weather. On the 3rd the weather again became moderated; and on the 4th he says the weather did blow a hurricane. No doubt that is a very strong phrase, but the other evidence as to the weather leads me to think that was an exaggeration. Now, the mate, in his deposition, does not use the word "hurricane" at all; he uses the expression, "wind blowing heavily and strongly"—a stiff breeze. She went out at four o'clock, and had run six or seven hours, and she might have been fifty or sixty miles from Newcastle-on-Tyne at that time. Now, we find incidentally that it was blowing a fresh breeze when she started from the Sunderland docks, and towards midnight it had risen towards a strong gale—nothing approaching a hurricane at all. At the Spurn Light, which is some way further south, where the account of the weather is registered, there is no weather which would amount at all in any way to a hurricane, and though it is quite possible there might be at the place where the engines were disabled, from which the vessel had drifted down to near Spurn Head—she was about 20 miles from the Spurn Head at the time she was actually lost—though it is quite possible there might have been heavier weather there than at the Spurn Head, it is not likely there would be anything like a hurricane, or anything of that sort; and [the result, I think, looking at the whole thing, looking at the note of the engineer of the state of the weather, is that that exaggerates the state of the weather; and, even if it did not, if the vessel at the moment of the engines breaking down, became unmanageable and went into the trough of the sea, that leads me very strongly to think, as a matter of fact, that the vessel must have been loaded to such an extent as to make her unsafe to meet with such weather in the German Ocean; and, taking it that she was overloaded, that she had much less freeboard than she ought to have had. Now, I do not agree with what Mr. Williams has said, that this is no part of

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what Mr. Norwood comes to complain of; on the contrary, I think it is a serious charge against Mr. Norwood that he should have done that—that he should have sent out a ship loaded in that way; and I think that Mr. Norwood properly resented it, and did complain of that, for I think the 13th and 14th paragraphs of his affidavit distinctly show that that was a very great part of the charge which he complained of—not the whole, but a great part of it. Now, I come to the conclusions which lead me, as a matter of fact, to say that she was overloaded, and that the loss was partly owing to the overloading. It is fair to state that when it had been rumoured that she had been overloaded there had been an investigation by the Board of Trade; and then, after Mr. Stephenson's letter to the Board of Trade Secretary, calling their attention to it, they made a further investigation. They did not take *visa voce* evidence, but they did look at the protest and the scantlings of the ship, and they did look at many of the papers which we have got. Still, they did not get the whole evidence which we have before us, nor did they hear anybody on the other side; still, notwithstanding that, I think that is not lightly to be passed by. I think the investigation made by the men of skill of the Board of Trade (two of whom are dead) is not to be passed by; yet, notwithstanding the conclusion they arrived at from the investigations which they made, I come to the conclusion that they were mistaken, and that there was overloading. I think it is quite true—and it is a fair remark to be made, and Mr. Norwood is entitled to make the remark—that he believed Mr. Laing built the vessel to carry 1,800 tons, and that he might properly be entitled to think that she would carry 1,800 tons; and I have no doubt he will probably continue to think he did not send out the vessel overloaded and unable to carry the 1,800 tons. I think it is probable he will continue to think so, and I think he will be entitled to say, "Here are underwriters who examined into the matter, and here is the evidence of nautical men and experts, who say that this vessel was not overloaded; that if it had been a point of law we should have been the best judges of that, but as to a point of seamanship, or a point relating to the capacity of a vessel of a certain build, the persons who built the vessel and nautical men would be better able to judge of that;" and he will also probably continue to say that the Board of Trade were right and that we are wrong. It is a fair thing to say. We have given that its due weight; but, notwithstanding

ing that, it is our duty to act upon the opinion we have formed; and that opinion is—at all events, it is my own, and I think both my learned brothers agree with me—that the vessel was overloaded, and that this was partly the cause of the loss. I think that is the greater portion of the charge made against Mr. Norwood, and that it is substantially true what Mr. Plimsoll has said as far as that is concerned. But then Mr. Norwood asserts, and he with great truth asserts, that Mr. Plimsoll has greatly libelled him—he has gone beyond that, and very considerably and very wrongly beyond what he ought to have done. Now, let us see how that is. Mr. Plimsoll, in his general remarks, makes a strong statement, but, notwithstanding, there is truth in it. An underwriter who has insured a vessel gets his premium and trusts to the good faith of those who are insuring with him, and that they will send out the vessel properly loaded and found; but if the vessel is lost, and there are suspicious circumstances attaching to her loss, he will probably say, "I do not intend to throw any suspicion on it, or to litigate it," as it is always very uphill work to do so; but when an underwriter insures a vessel, and the vessel is lost, and he does not say that the vessel has been overloaded, but pays the amount that he has insured, it is by no means to be taken as a proof that she has not been overloaded. It only goes to the extent that he may be afraid to put that forward, and thinks it is hopeless to go on and refuse to pay on that ground. When Mr. Plimsoll has used the argument, "When, therefore, the owner of a lost ship pleads in defence to a charge of overloading, or of any other nature that his claim for insurance has not been disputed by the underwriters, the plea itself is tantamount to a full admission of guilt—when it is stated in that way it is obviously illogical, and it shows what was in Mr. Plimsoll's mind. At page 2 he makes an allusion to this *Livonia* as being one of the particular vessels said to have been sent to sea overloaded. He says, "I make this appeal to the Right Hon. G. J. Goschen, First Lord of the Admiralty, as to whether I have not correctly stated the position of underwriters in this matter to Sir James Elphinstone, M.P. for Portsmouth, as to what he thinks of sending a spar-decked ship so loaded with iron that her main deck was 2ft. 10in. under water, into the extreme east of the Baltic in November." There can be no doubt he was making an assertion that she was a vessel with her main deck 2ft. 10in. under water, which, if she was a spar-decked vessel, in

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the sense in which Mr. Plimsoll is using the word, would show that she was very much overloaded; whereas, if she was not a spar-decked vessel, I think it would also show she was rather overloaded, but not so much overloaded as if she was a spar-decked ship. Then it seems Mr. Plimsoll did go down and inquire about the matters, and I think he saw at Newcastle-on-Tyne and Sunderland this Mr. James Hall, and I think there is very little doubt on the affidavits, that Mr. James Hall in speaking to him made some rash statements which he cannot now verify. It appears that Mr. Hall refuses to make an affidavit, and also that Mr. Hall, when one comes to look at it, had, in fact, a charter offered to him at the time for a steamer, and the steamer he is talking about is a steamer of 1,200 tons, and not a steamer of 1,800 tons; but he had a conversation with Mr. Plimsoll, and Mr. Plimsoll's saying that to send vessels to the Baltic at this time of year, when lights are withdrawn, is unsafe, is not the gravamen of the charge, but it is whether she was overloaded, when there would be some risk from that. Then he proceeds to say:—

"Mr. James Hall, of Newcastle-on-Tyne, had a large ship (1,500 tons) waiting for freight in the Jarrow Dock, and he was offered 30s. per ton to carry a cargo of railroad iron into the east of the Baltic. It was the middle of September, the rate was high, the ship was empty. It was, as he said, very tempting; so he sent for the captain of the ship, and asked him if he durst venture into the Baltic then. The captain said to him, 'For God's sake don't send us into the Baltic at this time of the year, sir. You might as well send us all to the bottom of the sea at once.' Well, Mr. Hall discarded the offer, but five weeks later the offer was accepted by another ship-owner, and he proceeded to load one of his ships."

Now, I think it appears clear that Mr. Hall did make some statements to him. It may possibly be that Mr. Plimsoll has attached too much weight to the statements he made to him, and I think Mr. Plimsoll is very much to blame to take the loose statements of a person in conversation, and, without making any further inquiry, to start with those statements and make an imputation on the character of Mr. Norwood. I think it is fair to Mr. Norwood to say, as far as this appears, there was no ground for saying that the freight had been hawked about, and that he took it at last. When 30s. was offered in September, it would be incredible that it should be ultimately taken for 22s. 6d., which I believe is the amount stated. It is right to Mr.

Norwood to state that it is clear that sensational bit of writing of Mr. Plimsoll's is utterly unfounded. Then he goes on to state what he considers to be a spar-decked ship, and how he considers that when iron is packed solid five cubic feet weighing a ton, that that is not a proper cargo. It all goes to the point of how she was loaded. Then, as to the main deck, he says: "Instead of her main deck being above the water-line 2ft. 3½in., it was actually 2ft. 10in. below the level of the water-line, and her spar deck was only 2in. above the water-line." Now, I think when it is stated she went out on an even keel of 21ft. 6in., that is not exactly correct, still it is substantially correct, but it is an exaggeration to say it was more. Then it goes on to say, "And this vessel so loaded was sent off to the Baltic in November, or five weeks later than the same freight had been refused by Mr. James Hall, of Newcastle-on-Tyne, on the ground that it was too late in the season to send a ship without imminent peril to the lives of the seamen." That, I think, was a rash statement, which, without sufficient inquiry, he ought not to have made. "Of course she was lost, foundered about 18 miles from the English coast, but fortunately her crew were saved by a fishing-boat. She was insured of course." Now on that I think there can be no doubt that what was intended to be conveyed, and what was conveyed, was that the owner of that ship, Mr. Norwood, who is plainly referred to, at that time was insured himself, and that he had the sole risk in the vessel. I think it cannot be doubted, and I think from what follows afterwards, it is clear that Mr. Plimsoll, at the time he wrote this, believed that Mr. Norwood was the sole owner of the vessel, and believed he was insured. The fact was that Mr. Norwood was only owner of 12-64th parts of the vessel, and as far as the hull was insured, he was not insured. The others were insured, and I cannot but feel that is a very great part of the imputation. It is not simply that Mr. Norwood sent her out, having loaded her so that it was dangerous to send her out, taking the risk, when it might be a matter of rashness to do so. That is not what Mr. Plimsoll goes on to say; but he goes on to say this—I do not think he means to convey that she was overinsured so that he would make a profit on the ship in the event of her loss, but he conveys the imputation that she was fully insured, and consequently he was reckless (his money being safe) about everything else. I think that is a very great aggravation of the libel, and a material and important part of it; and as to that, I certainly

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[Eng. Rep.]

think it would have been very much better if Mr. Plimsoll, when he found out how that was, had frankly stated it. I agree with what has been strongly urged by the counsel for Mr. Norwood, that neither Mr. Plimsoll in his affidavits nor his counsel have ever said, "It is true I have accused Mr. Norwood of having fully insured his vessel and of being the sole owner, but I find that is not so, and I am sorry that I made the statement." Neither he nor his counsel have ever said or intimated, "I am sorry for that," and it is a very great aggravation that having made that statement he does not now apologize for it. Then Mr. Plimsoll goes on, and from what appears in the libel, he was dwelling principally on the shipowners who were Members of Parliament, and he was dwelling upon Mr. Norwood and upon the others who brought actions, and more particularly upon the case of the *Livonia*—and he goes on to say that two or three of "what they call in the North the greatest sinners in the trade have got into the House, and that it is from them that opposition to reform is to be expected." Then he proceeds to state he will give an instance of it; and then he relates that he had a conversation with the other members, which is not material, and then he states a conversation with Mr. Norwood, although he does not give his name, yet he is the person referred to. He says: "After turning away from the members I have referred to, I encountered another, and told him I thought he would do well to stay, because it was probable I should refer to a case of a spar-decked ship being sent to Cronstadt in November, with a cargo of iron nearly twice as many tons as her registered tonnage, with her main deck between 2ft and 3ft. under the water-line. He threatened me with an action for libel if I did, but the voters of Derby had made me strong enough to defy him;" and so it goes on. It is quite plain, I conceive, when he avers that—indeed, it is pretty well clear that when he makes that statement he had the object in view of deterring two members of Parliament from speaking in the House of Commons, and of making their statements of very much less weight. I think that was a very improper thing, and that I think was an interference with the conduct of the members in Parliament, which, to my mind, was very wrong indeed. But to my mind the House of Commons is quite strong enough to protect itself, and the House has been appealed to on this very matter, and the House has taken action to protect what it considers its privileges and rights, and this part has been left out in the other books. Now, taking that

view of the matter, there comes the question which I have felt throughout; I feel where there is an imputation made in a libel upon a person, and part, and a really serious part of the charge which has been made, is really true, and while a large part is left besides, which is not excused or justified, but is stated to be true when it is not, it becomes a question of whether, more or less, there should be a criminal information allowed by the Crown to punish the party for that part which is certainly unexcused and unjustified. I think I have stated several times that we have hesitated as to whether we ought not to let the rule go. But it seems to me in the view I hold, as I pointed out, that in my opinion—and I believe my brothers on either side of me agree in that opinion—clearly the statement that Mr. Norwood was insured is incorrect, and that the amount of overloading, or rather the nature of the ship, which would make that ship overloaded, is greatly exaggerated. So far as the overloading goes, it is clear Mr. Plimsoll is right; yet, although it is clear that a substantial part of the libel, as to the vessel being overloaded, is made out to our satisfaction, I think we ought not to refuse the rule for a criminal information without expressing our opinion that Mr. Plimsoll is deserving of some censure, in the only way in which we can mark it, and that is by saying, that though the rule nisi must be discharged, yet that it should be discharged without costs.

QUAIN, J.—I am of the same opinion. I think, although we have found (which I have arrived at with great difficulty) that this vessel was lost because she was overloaded, yet we cannot consistently proceed to make this rule absolute. The rule is well laid down in the expression my brother Blackburn has quoted, in the 4th volume of Blackstone, that the Court will not permit this information to go,—

"Except in serious cases, as for gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government, for those are left to the care of the Attorney General, but which, on account of their magnitude and pernicious example, deserve the most public animadversion, and moreover the Court always consider an application for a criminal information as a summary extraordinary remedy, depending entirely upon their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must appeal promptly or must satisfactorily account for any apparent delay. He must also come into court

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with clean hands and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the Court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants."

Now, having come to the conclusion that the loss of this ship was in consequence of her being overloaded, I think we cannot, consistently with these rules, make this rule absolute. I have come to that conclusion, I must say very candidly, with diffidence, because I have had nothing but mere individual evidence before me, and conflicting evidence, and I know how difficult it is to come to a conclusion on that subject; but we have had to do it as well as we can, and upon these affidavits as they stand, upon the evidence which has been given, coupled with the admitted behaviour of the ship after her engines had broken down, I cannot satisfactorily to my own mind account for the loss of that ship within a few miles of the port of departure, and within a few days after she had sailed—I cannot come to any satisfactory conclusion in my own mind other than that the ship was overloaded, and so was unable to compete with what was not extraordinary weather at all by reason of her carrying too much cargo. I cannot leave out of my mind that which strongly enters it,—that the two stevedores, Anderson and Campbell, whose character has not been attacked that I can see, who loaded this vessel, and who are experienced both in seamanship and in loading ships, also say, "In our opinion, for the time of the year, the ship was very much and dangerously overloaded, and I would not have sailed three miles in the ship if I had to receive the whole ship and cargo as a present at the end of that distance." Now that is very strong, and therefore, having to come to the conclusion that this ship was so lost by overloading, I think we cannot, consistently with the rules of the Court, put the criminal law in motion against Mr. Plimsoll. Still, I must say, in conclusion, in justice to Mr. Norwood, that while we dismiss this information, I think there are expressions in this book greatly to be regretted. I think, even though we come to the conclusion that the *Livonia* was overloaded, it was very easy for Mr. Plimsoll to have ascertained that Mr. Norwood was away when that was done; it was very easy for him to ascertain that he bought the ship some years before, stipulating that she should carry 1,800 tons; and I must say myself that, looking at that fact as

proved, I think it no justification at all to Mr. Plimsoll for the expressions which he used. I think he has no right to draw an inference that Mr. Norwood is one of the "greatest sinners" in the trade, and that he does habitually send ships to sea overloaded, with a reckless disregard for the safety of the crew, knowing that in the event of loss of ship, he will not be out of pocket, because he is fully insured. That is a frightful charge, and as far as the evidence is before us, I must say wholly without justification. I think Mr. Plimsoll ought to remember, and I beg him to remember, that the best of causes may be injured by bad advocacy, and that these observations he has made are calculated to injure the cause he has at heart, which I am far from saying is not a good one. These gross charges which have been made appear, from the evidence which has been put before us, to have no ground for justification at all; and therefore I say I entirely concur in the judgment of my brother Blackburn; and to mark the sense of the Court I think we should make Mr. Plimsoll pay his own costs, and therefore the rule will be discharged without costs.

ARCHIBALD, J., delivered a judgment concurring with these.

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THE PRAIRIE PROVINCE, with maps and illustrations. By J. C. Hamilton, M.A., LL.B. Belford Bros. Carswell & Co.: Toronto, 1876.

Since Manitoba became a part of the Dominion the want has often been expressed of a handbook for the emigrant and tourist to that region.

All who read the book now before us will, we think, admit that this has been supplied by Mr. Hamilton. A member of one of our oldest Toronto law firms, he turns his annual vacation trip to account, leaves "cap and gown and store of learned pelf," and makes his way by the Toronto, Grey and Bruce Railway, the north shore of Lake Superior, the Northern Pacific Railway and the winding Red River of the North to Winnipeg. Thence he makes excursions from that river through the famous Selkirk settlement to Lake

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Winnipeg and to various other places over the Prairie Province.

The author evidently made good use of his time, and came home with note books well filled and much valuable material, drawn from a great variety of sources, all which have been well digested and arranged in this neat octavo. Full particulars as to the route and modes of travel are given. Lithographic maps accompany the volume, and show the various settlements, the region surrounding Manitoba, and the Dawson route. One of the fourteen chapters of the book gives an interesting description of Winnipeg, said to contain about 6,000 souls. Another gives a full account of the grasshoppers, the terrible Rocky Mountain locusts—*Coloptenus spretus*—which occasionally come from the dry and arid plains of the western United States territory, to pay the Manitobans an unwelcome visit. The sixth chapter contains a varied sketch of the Indians and half-breeds, and of Indian treaties. The history of the old fur companies and the great Hudson's Bay Company is also clearly drawn. The eighth chapter, devoted to climate, productions and prospects of the country, exhibits, in the most convincing manner, the fertility and importance of the great Fertile Belt, and its superiority to the lands of the United States west and south of our Red River.

As a lawyer, Mr. Hamilton is well qualified to tell us of the courts and civil institutions now on trial in the North Land. The late constitutional change, which abolished the upper house of the local legislature, is described. We quote as follows:—

"The appearance of this little Legislature, especially in its first session, was such as tended to amuse spectators accustomed to more august gatherings of the people's representatives. Ancient English forms and precedents were followed as far as circumstances permitted; but there were, among the members of mixed blood, some more accustomed to the chase of the bison

than to following orators through labyrinths of argument. The favourite dress of one, of taste akin to Garibaldi, was a red flannel shirt and moccasins. When Mr. Archibald first appeared in glorious array, to take his gubernatorial seat in the Legislative Council Chamber, an astonished legislator ejaculated: "*Tiens! Ce n'est pas un homme; c'est un faisan doré.*" We find the spirit of Ontario in the statute book and judicature, as well as in the forms of the Legislature. This is the more apparent since Lieutenant-Governor Archibald left the Province and the present Chief Justice was appointed.

The Ontario lawyer finds himself at home in the Courts of Manitoba. English law, as to civil rights, has been introduced by local enactment as it stood in 1870. The law as to criminal offences is that of the Dominion. The Court of Queen's Bench—Chief Justice Hon. E. B. Wood, Justices McKeagney and Betournay, who, as other Canadian Judges, hold office by appointment of the Governor-General in Council, and during good behaviour—holds its sessions thrice a year in Winnipeg, having legal and equitable, civil and criminal jurisdiction in all matters. In regard to costs, civil cases are divided into a higher and lower scale. Through the over-ruling influence of the Chief Justice, the code to which he was in practice accustomed, as set out in the Ontario Common Law Procedure Act and the General Orders of the Ontario Court of Chancery, has been adopted. Mr. Cary, a cultivated gentleman, is at once Prothonotary, Master in Chancery, Clerk of Records, and Interpreter of the Court. The judges sit separately, exercising original jurisdiction, and *in banco* together on appeals, &c. The Province is divided into several judicial districts, in which county courts are held by the judges named, as occasion arises. The Chief Justice practically acts as Chancellor. He complains that he has not enough work to occupy his time. The bar has some able representatives."

In another part of the volume a report is given of the *causes celebres* tried at York and Quebec in 1818, and which arose out of the troubles between the contending fur companies. The author has, with the aid of the late Colonel Gagy, traced the DeReinhard case to its conclusion in the pardon of that cruel murderer by order of King George IV. As important legal points were raised at this trial, and will be again opened at the

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arbitration concerning the North West boundary of Ontario, professional readers will note the importance of the subject here treated.

We regret that space will not permit of our transcribing some of the stanzas on "The Red River of the North," and the very interesting description of that and of the Rosseau river, found in the third chapter; nor the amusing description of the Mennonites, and verses on "The Mennon Bold," in the thirteenth chapter.

We can only refer our readers to the volume with the assurance that they will find it in style and substance to reflect credit on author and publishers, and well worth the having. Besides the maps there are various woodcuts, which add to the value of the book.

THE NEW ZEALAND JURIST (New series),
February and April, 1876, Dunedin,
N.Z.

If the teeming millions of the great Anglo-Norman race are not the "lost ten tribes," it is not because they do not inhabit the "isles of the sea." It is natural to see a multitude of legal periodicals issuing from the presses of Great Britain, nor are we surprised to read the legal news of Australia in their legal journals, but seeing the *New Zealand Jurist* brings forcibly to our mind the extent of that empire, part of which, at least, now owns an Empress. It might also remind us of Macaulay's New Zealander on London Bridge, if we did not know that the heart of the Empire is still sound.

The numbers of the *Jurist* that we have before us are well on in the first volume of the new series. It is edited by a barrister of the Middle Temple, and if the contents of the numbers before us are any index, we should say that neither he nor his reporters have lost vigour or learning by being transplanted to the antipodes. Their law-list

shows two hundred and twenty practising barristers and solicitors. The Courts are thus formed: A Court of Appeal; the Supreme Court, presided over by a Chief Justice and four Judges, and seven District Court Judges. Our brethren seem, also, to have their little difficulties as to their Appellate Court, and many of the observations in the article copied below are not inapplicable in this country. They certainly coincide with our own view, that the Judges of a Court of Appeal should not only be men of great learning, but should also have had a long judicial training, and a successful career on the Bench, both of which are necessary to inspire the fullest confidence in their decisions:

"It has been stated in the newspapers that the retired Judges, Mr. Chapman and Mr. Gresson, are to be called to the Legislative Council. We have nothing to say on that subject, although we might say that the presence of experienced lawyers in the Council is very much needed; but we take the opportunity of suggesting that, whether they are called to the Legislative Council or not, their services should be promptly secured, if possible, as members of the Court of Appeal. In that capacity it would be in their power to render higher service to their country than in any other; and we think we are justified in saying that they would not, if called upon, be unwilling to act. It is obvious that the Court of Appeal, as it is now constituted, is not so strong as it might be. Four of our ablest and most experienced Judges have been absent from its sittings during the past year,—three by reason of retirement from the Bench, and one by leave of absence from the Colony. The Judges who have taken their places are new to judicial work, and for that reason they cannot be expected to fill the very visible gap left in the constitution of the Court. Of the four Judges who composed it during its last sitting, one only possessed more than a twelvemonths' experience as a Judge. Its strength will, undoubtedly, be increased when Mr. Richmond resumes his duties; but why should it not be still further increased by the experience and learning of Mr. Chapman and Mr. Gresson? Under any circumstances it is highly desirable that it should be strengthened as much as possible. Although termed a Court of Appeal, and supposed to be a tribunal of the last resort in

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the Colony, it is practically nothing more than the Supreme Court under another name; and a reference to the reports will show that, while its nominal strength is five, its actual strength for field service is often four, and sometimes three. While the administration of justice is carried on under the "one-horse" system which exists at present, appellants from the Supreme Court are surely entitled to expect something more for their money than a mere ride in a merry-go-round. It is a singular fact, and one "not generally known," that the costs of an appeal from the Supreme Court at Dunedin to the Court of Appeal at Wellington are actually greater than the costs of an appeal to the Privy Council. For instance, the costs of the proceedings, including the two appeals to the Court of Appeal, in *Burns v. The Otago and Southland Investment Company*, exceeded £1,500; while the costs of appeal to the Privy Council, *Maclean v. Macandrew*, did not exceed £350. Under such circumstances, we can only express our unfeigned surprise that the Court of Appeal is ever appealed to at all, except in Wellington causes; and there is at least some ground for supposing that, unless the Court is materially strengthened by the appointment of additional Judges, the tendency will be in future to send appeals direct to the Privy Council, instead of sending them to Wellington."

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Issue Books.

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—By a rule of Court of Hilary Term (7th February, 1876) rule 33 as to issue books is rescinded. By sec. 17 of 32 Vict., cap. 6 (the Law Reform Act), it is provided that all issues of fact, &c., in Supreme Courts may be tried, &c., in County Court, and *vice versa*, "in which case an entry shall be made in the issue and subsequent proceedings," &c., in the form given. What is the meaning of "issue" in that section, and is it proper still to deliver issue books in such cases, or will the notice of trial alone be sufficient? Yours, &c., E. M.

[The effect of the rule of last Hilary Term is, we think, to render the issue-book no longer necessary; and in sec. 17 of the Law Reform Act, the "issue" must now be taken to mean the Record. The object of the issue-book is to ensure a

correct transcript of the proceedings. This object was formerly attained, as it is now, by having the record "passed," i.e., examined by the officer of the court; but when, by 19 Vict., cap. 43, sec. 154, it was enacted that records should not be sealed or passed, it became necessary to introduce the practice of serving an issue book, which was accordingly done by rule 33 of Trinity Term, 1856. It was subsequently enacted by C. S. U. C., cap. 22, sec. 203, that records need not be sealed, but should be passed; the reason for the delivery of issue books, therefore, ceased, but rule 33 remained unrepealed, and reference to the issue books was made in other parts of the Consolidated Statutes. Now, however, the Rule of Court has been expressly repealed, and as the issue-book was introduced in the first instance by the authority of the judges, there can be no question of the competence of the same authority to do away with it, although references to its use were necessarily introduced into the statute book when the former practice was in force.—Eds. L. J.]

Increase in Fees for Certificates.

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—In the summary of the proceedings of the Benchers in Hilary Term, last published in the *Law Journal* of the month of May, it appears to have been resolved that the fees in future to be paid for certificates by attorneys, including term fees, shall be \$30 per annum, in order to provide for a proper and efficient system of reporting the judgments of the courts.

Now, this will be a large and heavy increase in the taxation of professional men, and the announcement has caused a good deal of interest and excitement in those who are called country practitioners. And the increase is felt the more especially as the statement of the receipts and expenditure would show that the society had a large surplus, its revenues being over \$36,000 and its expenditure only \$32,300, independently of the out-

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standing assets, amounting to \$42,108. This surely establishes that there is no necessity for the increase in the fees.

I presume it would be in the nature of an improper enquiry to ask why the sum of \$7,810 should be expended on the Hall and grounds. The sum formerly allowed to the committee was \$800, and this was found usually sufficient for keeping the grounds in order, which comprise about five acres. Then, again, the sum of \$3,127 appears to have been expended upon the library, a large sum to be applied, in my view, for keeping up the reports, the new editions of standard works, and other books of a valuable kind. This last sum is also very considerably larger than under the old *regime*. Again, one would wish to be informed what "petty expenses" could amount to \$425.

As I am living at a distance from Osgoode Hall, and never see the grounds nor enter the library, I derive no benefit or advantage from them. I should not have minded the outlay if the fees had remained at \$18, in place of \$30.

A POCKET ATTORNEY.

RULES OF COURT.

QUEEN'S BENCH AND COMMON PLEAS.

The following rules were promulgated last Easter Term in the Courts of Queen's Bench and Common Pleas :

1. One of the Judges of one of the Superior Courts of Common Law shall sit in open Court each week in Osgoode Hall, pursuant to the Administration of Justice Act, 1874, for the hearing and disposing of such matters, and the transaction of such business as may be heard, disposed of, and transacted by a single Judge.

2. There shall be no such sitting at any time between the 1st day of July and the 21st day of August, both days inclusive, or between the 24th of December and the 6th day of January, both days inclusive.

3. The Judge shall sit on Tuesdays and Fridays, at the hour of twelve o'clock noon, or on such other day or days, and at such other hour or hours as the Judge for the time being shall appoint.

4. It shall be in the power of the Judge, if he see fit, to sit only on one day in each week, if the same be at any time found sufficient for the disposal of business.

5. The Judge may adjourn the sitting of the

Court from one day to another, and so from day to day if found necessary for the disposal of business.

6. The Judge sitting as aforesaid shall either before, during, or after such sitting, as the Judge may appoint, dispose of all such business in Chambers as cannot be disposed of by the Clerk of the Crown and Pleas of the Court of Queen's Bench.

7. All rules for the purpose of the said sittings shall be four day rules, and shall, unless otherwise ordered by the Judge, be set down to be heard at the first sitting next after the same is returnable.

8. All demurrers, special cases, appeals from the decision of the Clerk of the Crown and Pleas of the Court of Queen's Bench in Chambers, shall be left with the Clerk of the Court for the time being, on a day not later than two clear days before the day on which the same are to be heard—that is to say, not later than Tuesday for Friday, and not later than Saturday for Tuesday.

9. All rules, demurrers, special cases, appeals or other matters intended to be argued before the Judge, shall, previous to the sitting of the Judge on the particular day for the hearing or disposal thereof, be entered by the Clerk of the Court on a list, one copy of which shall be delivered by the Clerk to the Judge, and another posted up outside of the court-room.

10. All rules, demurrers, special cases, appeals, and other matters entered on the said list, shall be called on and disposed of in the order in which the same are entered on the list, unless the Judge otherwise order.

11. The first business at each sitting shall be motions of course, and motions for rules *nisi*, and the next, the cases on the list in the order in which they are entered, unless otherwise ordered by the Judge.

12. Any party desiring the rules, order, or decision of the Judge to be reviewed and reheard by the full Court in which the cause or matter is pending, shall give notice in writing to that effect to the opposite party, within two weeks next after the day on which the rule, order, or decision shall have been granted, made or pronounced.

13. Unless such notice as last aforesaid be given, the party in default shall, in the discretion of the full Court, be liable to pay the costs of the review and rehearing.

14. Except the full Court in the particular case otherwise order, there shall be no review or rehearing allowed by the full Court, unless the same be had within the Term of the Court next

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following the granting, making or pronouncing of the rule, order or decision, with which the party is dissatisfied.

15. If the review or rehearing be proceeded with within the period of two weeks next after the day of the granting, making or pronouncing of the rule, order or decision with which the party is dissatisfied, no notice in writing, such as required by rule twelve, shall be required to be given, but if given, may be allowed for on taxation.

16. The cause or matter to be renewed or reheard shall be set down to be heard on one of the "Paper Days" during term, or on such other day during term as the full Court may appoint for the purpose; and shall be set down to be reviewed and reheard at least two clear days before the day on which the same is to be argued.

17. The party setting down a cause or matter for review or rehearing shall deliver to the Clerk of the full Court, three copies of the written decision, if any, delivered by the Judge, certified to be correct by the reporter of the Court; and in the case of a demurrer or special case, shall also deliver to the said Clerk three copies of such demurrer or special case.

18. Notice in writing of the intended review and rehearing shall forthwith, after the cause or matter is set down to be reviewed and reheard, be delivered by the party setting the same down to the opposite party.

19. No petition, rule or order shall be necessary for the purpose of review or rehearing in either of the Superior Courts of Common Law.

20. On a review or rehearing, the party setting down the cause or matter for review or rehearing, shall have the right to begin or reply, unless otherwise ordered by the Court.

21. Nothing in the foregoing rules contained shall be held or taken in any manner to deprive any party of the right to have a cause or matter reviewed or reheard, where the right is conferred by statute, but only to speed the course of proceeding with a view to such review and rehearing.

22. Nothing in the said rules contained shall be held or taken in any manner to interfere with the power of the Court or Judge in their or his discretion for good cause, as regards any particular case, to dispense with all or any of the said rules.

23. The Rules of Trinity Term, 38th Victoria, promulgated on 5th September, 1874, shall be rescinded on, from, and after the day these rules shall take effect.

24. These rules shall take effect on the second Monday of the present Term of Easter.

OSGOODE HALL,
Monday, May 15th, 1876. }

It is ordered that the Marshal and Clerk of Assize for the County of York, do forthwith, after the close of each Assize, or earlier if required, return to the Clerks of the respective Courts of Queen's Bench and Common Pleas and the Registrar in Chancery, all records in the said Courts respectively, together with all exhibits and other documents appertaining thereto.

(Signed) JOHN H. HAGARTY,
ROBT. A. HARRISON,
JOS. C. MORRISON,
JOHN W. GWYNNE,
THOMAS GALT.

May 16, 1876.

QUEEN'S BENCH.

The following rules were also promulgated in the Queen's Bench :

1. That the business to be transacted in the Court of Queen's Bench for the Province of Ontario during Trinity Term next shall be the same in all respects as business transacted during the other Terms of said Court, although such business may have arisen prior to or during the present Term of Easter, notwithstanding anything to the contrary contained in section 2 of Statute 38 Vict., Ont.

2. That the said business shall during Trinity Term aforesaid be conducted in like manner in all respects as the ordinary business during the ordinary Terms of the said Court.

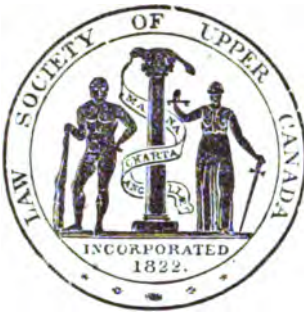
3. That eight cases in the order of their priority on the general list shall be set down by the Master on the peremptory list for argument on each of the first four days of the said Term, in the same manner and with the like effect as other days of the said Term.

4. That the first Friday and the second Monday of the said Term shall be Paper Days, as provided by the general rules of Michaelmas Term, 39th Victoria, but unless there be at least four cases set down for argument on each of the said days, six cases in the order of their priority on the general list shall be set down on the peremptory list for argument on each of the last mentioned days, or one of them, as the case may be, in the same manner and with the like effect as on other days of the said Term.

(Signed) ROBT. A. HARRISON, C.J.,
JOS. C. MORRISON, J.,
ADAM WILSON, J.

Osgoode Hall, Easter Term, 39th Victoria.
Saturday, June 3rd, 1876.

LAW SOCIETY, HILARY TERM.



LAW SOCIETY OF UPPER CANADA.

OSGOODS HALL, HILARY TERM, 39TH VICTORIA

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law :

The names are given in the order in which the candidates entered the Society, and not in the order of merit.

- No. 1350.—JOHN WILLIAM FROST.
HERBERT CHARLES GWTN.
JONIAS RICHMY METCALF.
ARTHUR GODFREY MOLSON SPRAGUE.
ROBERT GREGORY COX.
EDWARD DOUGLAS ARMOUR.
No. 1356.—ALBERT ROMAIN LEWIS.

And the following gentlemen received Certificates of Fitness :

E. GEORGE PATTERSON.
ROBERT PRANKSON.
JAMES LEITCH.
ROBERT GREGORY COX.
THOMAS COOKE JOHNSTONE.
EDWIN PERRY CLEMENTS.
WILLIAM MYDDLETON HALL.
EDWARD DOUGLAS ARMOUR.
ALBERT ERNEST SMYTH.
HEBER ARCHIBALD.
JAMES CARROTHERS HEGLEN.
GEORGE ATWELL COOKE.
DAVID LENNOX.

And the following gentlemen were admitted into the Society as Students-at-Law :

Graduates.

WILLIAM EGBERTON PERDUE.
JOHN MORROW.

Junior Class.

SAMUEL JOHN WEIR.
FRANK EGBERTON HODGINS.
WILLIAM WHITE.
DANIEL ERNSTUS SHEPPARD.
WALLACE NEBBITT.
JAMES B. MCKILLOP.
JAMES MORRISON GLENN.
J. STANLEY HUFF.
MICHAEL A. MCHUGH.
ERNEST V. D. BODWELL.
HUGH D. SINCLAIR.
JAMES WILLIAM ELLIOTT.
ROBERT CASSIDY.
DUNCAN CHARLES PLUMB.
WILLIAM AVERY BISHOP.
FRANCIS ARTHUR EDDIS.
JAMES GARRUTT.
JOHN CHARLES COFFEY.
JAMES RIDDILL.
HOWARD JENNINGS DUNCAN.

Articled Clerk.

JOHN A. STEWART.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely. (Latin) Horace, Odes, Book 3 ; Virgil, *Æneid*, Book 6 ; *Cæsar*, Commentaries, Books 5 and 6 ; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects :—*Cæsar*, Commentaries Books 5 and 6 ; Arithmetic : Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be :—Real Property, Williams' Equity, Smith's Manual ; Common Law, Smith's Manual ; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be, as follows :—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills) ; Equity, Snell's Treatise ; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows :—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows :—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows :—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Grith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,

Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR SEPTEMBER.

1. Fri.... Paper Day, Q.B. Last day for delivering appeal books in Court of Error and Appeal.
2. Sat.... Paper Day, C.P.
3. SUN... 12th Sunday after Trinity.
4. Mon.... Paper Day, Q.B.
5. Tues... Paper Day, C.P.
9. Sat.... Trinity Term ends. Last day for notice for call.
10. SUN... 13th Sunday after Trinity.
12. Tues... Gen. Sess. and Co. Ct. sittings for York only. Last day for J.P.'s to ret. con. to Clerk P.
13. Wed... Quebec taken by Wolfe, 1759.
15. Fri.... Court of Appeal sits.
17. SUN... 14th Sunday after Trinity. First Upper Canada Parlt. met at Niagara, 1792.
18. Mon.... Supreme Court constituted, 1875.
24. SUN... 15th Sunday after Trinity.

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THE

Canada Law Journal.

Toronto, September, 1876.

THE EIGHTH part of the new Digest is to hand, giving the cases under the titles included between "Executory Devise" and "Improvements on Land." From present appearances, the volume will exceed the size at first spoken of. Whilst hoping for a speedy conclusion, we can sympathise with the compilers in their most laborious task, and at the same time congratulate the profession that the work is being done for them in such a thorough and efficient manner.

IN consequence of the retirement of Mr. Leith, Q.C. and Mr. Lash from the positions which they lately held as lecturers and examiners in the Law School, it became necessary for the Benchers at their meeting before Trinity Term to elect two members of the profession as their successors. More than thirty applications from gentlemen desirous of ministering to the growth of legal education came up for consideration. The candidates on whom the choice of the Benchers fell were Mr. T. D. Delamere and Mr. J. S. Ewart, Barristers-at-Law, of this city. The department of Criminal Law and the Law of Torts has been assigned to Mr. Delamere, and that of the Law of Real Property to Mr. Ewart. The lecturers on Equity and General Jurisprudence have been re-appointed for a further term.

THE lately revived Term of Trinity has done good service this year in enabling the judges of the Court of Queen's Bench to dispose of the large arrears of business which had accumulated on their hands. This happy result is owing to the rule promulgated at the close of last Easter Term, by which the cases then remaining unargued in the Queen's Bench were to be taken up and disposed of in Trinity Term in the ordinary way by peremptory list. This rule has been so fully carried into effect, that out of sixty-four cases standing for argument at the beginning of the Term sixty-three have been argued or otherwise disposed of, and in twenty-one of them judgment has been already delivered. Some seven or eight new rules only have been added to the list, so that the Court may practically be said to be abreast of its work. This state of affairs must be peculiarly gratifying to those concerned when we remember that at the close of last Michaelmas Term, when the present Chief Justice of Ontario came on

the bench, nearly a hundred cases remained to be argued.

CONTEMPT OF COURT.

THE judgment of the Court of Queen's Bench in the case of *The Queen v. Wilkinson* has been the innocent cause of probably the most atrocious and uncalled for libel on the Bench that has ever disgraced Canadian journalism. Foul abuse has been heaped upon a most impartial, upright, and painstaking Judge, and that with a cowardice and reckless disregard of decency which would make even the most bitter partizan cry shame. And not only has this been done, but an attempt has been made to prejudice the public mind in reference to a cause still in litigation. On both grounds, the article in the *Globe* newspaper was utterly indefensible. Events follow each other so rapidly now-a-days, and are so fully and so immediately discussed, that it would be a waste of words to detail the legal bearings of a matter with which our readers are already familiar; but a Bar which, as well as the public, is justly proud of its Bench, cannot and ought not to overlook this wanton and shameful attack upon Mr. Justice Wilson. It is not likely that the libeller will be prosecuted. The punishment for his scandalous contempt of Court will be the unqualified contempt of the public, in lieu of fine or imprisonment. But if this sort of thing is to continue (and we have had too much of it lately on all sides, as we recently pointed out) it will become a serious question whether an example should not be made, and the dignity of the Bench, which means Law and Order, vindicated and upheld. If allowed to go on, people will get so used to it that they will think there is no harm in it, and irreparable injury will have been done to the due administration of justice in this country.

HUMOROUS PHASES OF THE LAW.

The dog-days are over, but something light in the way of legal literature may still be appreciated by the wearied practitioner whom adverse fate has chained to his desk during vacation. If so let him peruse "Humorous Phases of the Law,"* the first of a series of "Legal Observations" issued by an enterprising firm in the Golden State of the neighbouring Republic. It is a neatly bound little volume, with clear type, on good paper, and well deserves its name. A baker's dozen of sketchy articles, which originally appeared in the *Albany Law Journal*, are here grouped together, and form a volume most enjoyable. Especially to a Canadian lawyer do some of the American decisions and cases, herein referred to, appear as beautifully cool and refreshing as a draught from an Arctic soda water fountain.

We know not what higher praise we can give the work than the acknowledgment that in October, 1870, we republished in our paper the whole of the first chapter, on "The Conduct of the Courts;" a graphic and amusing account of the "doings and goings on" in an ordinary court room; and, in July of the following year (so much was the first article appreciated), we reproduced the interesting paper on "Ecclesiastical Law."

The second chapter deals with the Law of Sunday. The laws on this point in Connecticut and Massachusetts, as well as in the other New England States, savour strongly of the strictness of the Mosaic dispensation, and depend more upon the peculiar legislation and customs of the States than upon any general

* HUMOROUS PHASES OF THE LAW. By Irving Browne. San Francisco: Summer, Whitney & Co. 1873.

HUMOROUS PHASES OF THE LAW.

principle of justice; they appear as severe now as in the early days of the Republic, when the Chief Justice of Massachusetts, and his associates, were indicted for Sunday travelling. Charity and necessity alone saved the Sabbath-traveller from punishment. A poor shoemaker, in Massachusetts, was imprisoned for hoeing a few hills of potatoes early one Sunday morning; although he had been unable to finish them the night before, even by working at them by moonlight (*State v. Josselyn*, 97 Mass., 411.) The poor wretch ought to have been mindful of the proverb, *ne sutor ultra crepidem*.

Even in Arkansas a man was indicted for cutting his grain on Sunday, although it was suffering from over-ripeness and he had been unable to get a machine before Saturday night (*State v. Goff*, 20 Ark., 289.) One can scarcely imagine the Scribes and Pharisees of old being much more stringent in their interpretations of the command, 'Remember the Sabbath day.' Blowing one's own horn is unlawful in Massachusetts on Sunday (*Com. v. Knox*, 6 Mass., 76.) The author remarks that this gives one a vivid idea of the amount of self-denial exercised by the Bostonians on that day. The decision reminds one of the unfortunate stranger in Toronto, who was arrested for playing a fiddle in his back room, fined heavily and admonished by the Police Magistrate. (4 U. C. L. J., N. S. 165.)

Visiting one's father is a work of necessity and charity (*Logan v. Mathews*, 6 Penn. Lt. 417); whether calling on one's sweetheart is so was discussed, but not decided (*Buffington v. Swansy*, 2 Am. Law Rev. 235.) Our author informs us that a will made on Sunday is valid, seemingly on the ground that many good words and pious expressions are therein contained.

Under "The Law of Necessaries" we are told that a wife's necessaries are to be

judged not by the real, but by the apparent or assumed position, of the husband: 'The lawful measure of mercantile phlebotomy seems to be what the husband's apparent venous system will afford.' New bonnets have doubtless been necessaries ever since the days of St. Paul; still the courts have been rather severe upon ladies in the matter of millinery. Lord Abinger, in one case, declared that the expenditure of £5,287 on bonnets, laces, feathers and ribbons in less than a year, was extravagant (*Lane v. Ironmonger*, 13 M. & W. 368,) and that a husband was not bound to pay £67 for a sea-side suit for his wife, when he had forbidden her going to the watering place (*Atkins v. Curwood*, 7 C. & P. 759.) But a lawyer has had to pay £94 for silver fringes to a petticoat and side-saddle, which his spouse considered an essential (*Stair*, 349).

In Vermont a man was made to pay for his wife's false teeth (*Gilman v. Andrews*, 20 Vt. 241.) In the Republic a husband has not to pay for the file wherewith a wife seeks to sever the marriage fetters (*Coffin v. Dunham*, 8 Cush. 404). Less happy are the Benedicts of this side of the line, for they have to advance money, and pay the wife's costs in alimony suits. As to infants, "treats" are not necessaries (*Brooker v. Scott*, 11 M. & W., 67); nor are betting-books (*Genner v. Walker*, 3 Am. Law Rev. 590.) Sergeant Hawkins asserted that for a youth of twenty summers a wife was not a necessary, and that even if she were, a baby was not (*Harrison v. Fane*, 1 M. & G. 550.) Nor will the Court allow a tailor's bill of £840, for 19 coats, 45 waistcoats, 38 pairs of pants, &c., purchased within thirteen months (*Barghard v. Angerstein*, 6 C. & P. 690).

Mr. Browne discourses pleasantly on the subject of wagers, but his texts are well-known English decisions. In his

chapter on 'The Animal Kingdom in Court,' he quotes at length a most interesting and humorous judgment in an action brought for injuries done to the plaintiff's dog by the defendant's dog in a fight. The learned Judge concludes by saying, that the owner of the dead dog was clearly entitled to the skin, (although some, less liberal, would be disposed to award it as a trophy to the victor), and that with that he must be content (*Wiley v. Slater*, 22 Barb. 506.) Judge Nelson has decided that one may lawfully kill a dog that habitually haunts the neighbourhood, barking by day and howling by night (*Brill v. Hayter*, 23 Wend., 354). Would not this decision authorize the slaughter of those caterwauling animals who make night hideous with their feline loves and squabbles.

In the chapter on 'Negligence' we find the case of a man being sued for suffering his cow to drink his (the defendant's) maple syrup (*Bush v. Brainard*, 1 Cowen 78.) Under 'Nuisance' we learn that the North Carolinian courts have no music in their souls (this in Shakespeare's opinion will doubtless account for their following Jeff. Davis in the late unpleasantness); and they held it no nuisance for evil men and boys to curse and swear so loudly in a tavern as to break up a singing school hard by (*State v. Baldwin*, 1 Dev. & Bat. 195.) *State v. Linkham*, 69 N. C. 214 was an amusing case in the same State. A strict member of the Methodist Church, and a man of the most exemplary deportment, was indicted as a nuisance for singing the hymns of Wesley in such a way as to disturb the equanimity of the whole congregation, making the irreligious laugh and the pious fume. The Court set aside the jury's verdict of guilty; although one of the witnesses gave a specimen of the style of singing.

Space will not permit us to refer to the

other chapters of this spicy—but somewhat irreverent—volume, which are entitled, Pleading before the Code; Pleading under the Code; A Society for the Prevention of Cruelty to Lawyers; The Idiocy of Married Women and Trade Marks.

LAW SOCIETY.

EASTER TERM, 39 VICTORIA.

The following is the *resumé* of the proceedings of the Benchers during this Term, published by authority:—

Monday, 15th May, 1876.

The Report of the Scrutineers appointed last Term was read by the Secretary, as follows:—

"OSGOODE HALL, April 10th, 1876.

We, the scrutineers appointed by the Law Society last Term, to act at the election of Benchers of the Law Society, under the Act in that behalf, for the next term of five years, find and report that the following thirty persons, having the highest number of votes, are entitled to be declared the Benchers of the Law Society from and after the first day of Easter Term now next, that is to say:

J. D. Armour, Q.C.; H. C. R. Becher, Q.C.; John Bell, Q.C.; T. M. Benson; James Bethune, Q.C.; B. M. Britton, Q.C.; M. C. Cameron, Q.C. (Toronto); Hector Cameron, Q.C.; John Crickmore; A. S. Hardy, Q.C.; J. A. Henderson, Q.C.; Thos. Hodgins, Q.C.; John Hoskin, Q.C.; Robert Lees, Q.C.; A. Lemon; Dalton McCarthy, Q.C.; F. McKelcan, Q.C.; Kenneth McKenzie, Q.C.; D. McMichael, Q.C.; John Maclellan, Q.C.; E. Martin, Q.C.; W. R. Meredith, Q.C.; J. A. Miller, Q.C.; F. Osler; T. B. Pardee, Q.C.; D. B. Read, Q.C.; S. Rich-

LAW SOCIETY.

ards, Q.C.; Thos. Robertson, Q.C.; J. S. Sinclair, Q.C.; L. W. Smith.

(Signed,) John Crickmore.
Thomas Hodgins.
D. B. Read."

The Hon. John Hillyard Cameron, Q.C., was unanimously elected Treasurer for the ensuing year.

The Report on Rules for Special Cases, under 39 Vic., ch. 31, was received and read, and ordered to be discussed on Tuesday, 30th inst.

The Treasurer reported that J. S. Sinclair, Esq., a Benchler of the Society, had been appointed Judge of the County of Wentworth. Ordered that notice be given for the 30th inst. of the election of a Benchler to fill the vacancy caused by the retirement of Mr. Sinclair.

Ordered, That notice be given of the election of a Reporter of Practice and Chambers cases, in accordance with the Report of the Committee on Reporting.

The following gentlemen were called to the Bar, namely: Messrs. D. E. Thomson, Robert Pearson, H. J. Scott, R. M. Meredith, James Leitch, C. J. Holman, J. F. Wood, E. J. Reynolds, Philip Holt, M. Kew, Alex. Haggart, W. M. Hall, J. P. Whitney, A. Monkman.

The following gentlemen received certificates of fitness, namely: Messrs. Scott, Hodgkin, Thomson, Wells, Reynolds, Perkins, Robb, Goodwillie, Wood, Holman, Haggart, McMahon, Holt, McConkey, Burgin, Moscrip, Malone, Whitney, Galbraith, Morton, Locke.

Monday, 16th May.

By-Law relating to Law Benevolent Fund was read a first time, second reading on following Saturday.

Ordered, That notices of call of Messrs. McDonald, Essery and Van Norman may be given for next Trinity Term, or for any future Term.

Certificate of fitness granted to W. H. Ross.

Saturday, 20th May.

The address and testimonial voted by Convocation on 18th February, were presented to the Hon. John Hillyard Cameron.

Mr. O'Leary was called to the Bar.

The report of the President of the Law School on the examination for special honours was received and adopted.

Mr. J. B. Clark was allowed a reduction of eighteen months, and was called to the Bar.

Mr. T. C. Johnstone, on special petition, was called to the Bar under 39 Vic., ch. 31.

Mr. J. W. Nesbitt received certificate of fitness.

The several committees were duly appointed.

The report of Finance Committee on the communication received from the Dominion Telegraph Company, relative to their office in Osgoode Hall, was adopted.

The report of the Examining Committee was received, read and adopted, and examiners' fee for this term ordered to be paid.

Tuesday, 30th May.

Messrs. Kenrick and Plumb, members of the English Bar, were called to the Bar.

In the matter of J. S. Sinclair, Esq., Judge of the County Court of Wentworth,

Ordered, That it be referred to Messrs. Richards, McCarthy, and Oaler, to consider the question of the eligibility of Mr. Sinclair to continue a Benchler after his appointment as a County Judge, and that they be instructed to report to Convocation on the last Tuesday in June, to which day further proceedings in the matter of the election of a Benchler are adjourned.

[Mr. Irving has since been appointed in Mr. Sinclair's place.]

Ordered, That the applications for Chamber Reportership be referred to Committee on Reporting, with instructions to report thereon on the last Tuesday in June.

Mr. Armour gave notice that he would, on the last Tuesday in June, move a resolution having for its object the putting of the Law School on a more efficient footing, or the abolishing of it.

The petitions of Messrs. Dingwall, Rioridan, Johnston and McGillivray were granted.

The report of Finance Committee on the collection of unpaid fees was received, to be considered at the meeting in June next.

The petition of Mr. T. H. A. Begue to be called to the Bar under special circumstances was granted, and Mr. Begue was called to the Bar accordingly.

The following gentlemen were elected chairmen of the various committees, namely: Mr. Read, Finance; Mr. McKenzie, Library; Mr. MacLennan, Reporting; Mr. Hodgins, Legal Education.

Ordered, That the Rules under the Statute of last Session of Ontario Legislature do stand over for consideration until the last Tuesday of June.

Friday, 2nd June.

Messrs. Hodgins, Crooks, Meredith, Bethune and Benson were appointed a committee to meet a committee of the Senate of the University of Toronto on the subject of the Primary Examination of the Law Society.

Mr. Hodgins gave notice of motion for last Tuesday in June that application be made, under 36 Vic., ch. 29, to the proper authorities for the affiliation of the Law School with the University of Toronto.

Tuesday, 27th June.

The report of Committee to prepare Rules for Special Cases, under 39 Vic., ch. 31, was adopted.

The Committee on Reporting brought in their report, which was received and read.

Mr. J. Stewart Tupper was elected Reporter of Chamber, Practice and Election Cases.

NEW COURT OF LAW IN EGYPT.

THAT well edited legal quarterly, the *American Law Review*, gives a sketch of the new law courts in Egypt. As will be seen by the following extract, the Khedive has exhibited a liberality quite contrary to the traditions of his race. Later news however would seem to shew that the wheels of justice are not yet so nicely adjusted as to give litigants the full benefit intended:

"The past year witnessed the inauguration in Egypt, with characteristic ceremonies of Oriental solemnity, of a new system of civil courts, to have exclusive jurisdiction of causes arising between natives and foreigners, or foreigners of different nationalities. This system must be regarded as an experiment, and has been accepted only as such by the Western powers; but the state of things which it displaces was, on the whole, so unsatisfactory that it is scarcely possible that the old measure should ever be restored, whatever may be the result of the present "reform," as the new system is hopefully called. The judges in the new tribunals are to be partly natives and partly Franks; a majority being accorded to the latter on the bench of each court. They all receive their appointments from the Khedive; but he has stipulated to appoint the Frank judges in each case on the nomination of the responsible minister in the country from which he is selected. For the Court of Appeal six Frank judges have thus been appointed, one from each of the following nations—the United States, Austria, Germany, Great Britain, Italy, and Russia. The system includes, also, courts of the first instance, three in number, established at Alexandria, Cairo, and Ismailia. For the first, eight Frank judges have been appointed; for the sec-

NEW COURT OF LAW IN EGYPT.

ond, four; and for the third, three. There is also a Frank attorney for the government in the Court of Appeal, who has three Frank deputies for the lower courts; making a total of twenty-five appointments from the Western nations. France is the only one of the great powers of Europe which has not, at present, a judge on the appellate bench; but a French appointment will no doubt be made. Most of the smaller foreign powers having colonies in Egypt have at least one member in the lower courts. The number of native judges on each bench is at least one less than the number of Frank judges. The whole number of judges already appointed in all the courts is, accordingly, forty. As the whole population of Egypt is but five millions, and the aggregate resident population of Europeans and Americans (of the latter there are but few) does not exceed one hundred thousand,* it is apparent that the judicial force is ample, in comparison with that generally supplied in civilized countries. Nevertheless, the scheme provides for an enlargement by placing an additional Frank judge on the Court of Appeal (which, when thus completed, will consist of seven Frank judges and four natives), and by giving the court of first instance at Ismailia the same composition as that at Cairo; that is, four Frank and three native judges. Decisions in the Court of Appeal, when thus completed, must have the concurrence of five Frank and three native judges; and in the courts of first instance, that of three Frank and two native judges. Moreover, the scheme authorizes a further increase in the number of judges, should it be found necessary; but, in such case, the established relations between the number of Franks and natives on each bench must not be changed. In hearing commercial affairs, the judges will call in two assessors—one Frank and one native.

The Frank judges are guaranteed an independent tenure of office for five years (the term for which the system has been accepted by the Western powers), and handsome salaries paid out of the Egyptian exchequer.

In mentioning that the jurisdiction of the new courts covers civil causes between natives and foreigners, and between foreigners of different nationalities, it must be understood that the Khedive has consented to place within the scope of their cognizance, transactions of foreigners with the Egyptian government itself,

and its several departments or administrations, or with his "dairas" or private estates, or those of members of his family. This is a very important concession. The new courts will also take cognizance of actions relating to real estate situated in Egypt, even when the parties belong to the same nationality. They also have a restricted penal jurisdiction, with the assistance of a jury, applying only to simple police offences, and to offences of whatever grade directly against the judges, magistrates, assessors, jurors, and officers of justice, and also covering complaints against any of the classes of persons last mentioned.

The new courts are to be governed by a series of codes, "presented by Egypt to the powers," and comprised in a printed volume of five hundred and eighty-four duodecimo pages. "In case of the silence, insufficiency or obscurity of the law," as laid down in the codes, "the judges will conform to the principles of natural right and rules of equity." The languages to be used in the courts in pleading, and in official acts and decisions, will be the languages of the country, and Italian and French. The codes have already been printed in these languages, and copies of them extensively distributed.

The Khedive's brief but appropriate address on the occasion is worthy of record:

GENTLEMEN,—The high support of his Majesty the Sultan, my august sovereign, and the kindly co-operation of the Powers, allow me to inaugurate the judicial reform, and to install the new tribunals.

I am happy to see assembled about me the eminent and honourable magistrates, into whose hands, with entire confidence, I place the charge of rendering justice. Every interest will find complete security in your enlightenment, and your decisions will thus obtain universal respect and obedience.

This date, gentlemen, will be a marked one in the history of Egypt, and will be the point of departure of a new era in civilization.

God aiding us, I am persuaded that the future of our great work is assured.

The Khedive has been rather too sanguine as to the immediate success of the scheme. But Egypt will not for long be subject to the disturbing elements of a court of mixed nationalities.

* By a very exact enumeration made in 1871, the number was ascertained to be 79,896

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WRIGHT V. WRIGHT.

Bills and Notes—Renewal—Statute of Limitations—Pleading.

[Feb. 7, 1876—MR. DALTON.]

Declaration on promissory note. Plea that there was no consideration for the note, since it was given as a renewal of another note in which the plaintiff's remedy was barred by the Statute of Limitations.

Held, that the plea must be struck out, following the case of *Austin v. Gordon* 32 U. C. Q. B., 621, in which it was held that a debt for which a discharge had been given in insolvency was a continuing debt in conscience, and was, therefore a sufficient consideration for a promise to pay it.

QUEBEC BANK V. HOWE.

Wife's separate Estate—35 Vic. c. 16. s. 9—Pleading.

[MAY 5, 1876—MR. DALTON.]

Summons to strike out a replication. The action was brought against a married woman on a promissory note. She pleaded coverture at the time of contracting the debt; whereupon the plaintiffs replied that the note was made with respect to property, which was the defendant's separate property within the meaning of the statutes on that behalf.

Brough shewed cause.

Ritchie contended that the replication should be struck out on the ground that a married woman cannot be made liable unless she has a separate estate held to be such in Equity. The plaintiffs have already a replication on equitable grounds, setting up that the defendant had a separate estate, which is all that they require. The replication is embarrassing, as under it the plaintiffs might prove that the defendant had property within the meaning of Con. Stat. U. C., cap. 73, and succeed on such proof. But it has been held in *McGuire v. McGuire*, 23 C. P. 123, and other cases, that such property is not separate estate within the meaning of 35 Vic., c. 16, s. 9, so as to make a married woman liable on a contract made with reference to it.

MR. DALTON thought that the replication was unnecessary to the plaintiffs, and embarrassing to the defendants, and should therefore be struck out.

Order accordingly.

MERCHANTS' BANK V. MOFFAT.

Discovery—Communications between Attorney and Client.

[JUNE 26, 1876—MR. DALTON.]

A summons was obtained for the re-examination of the plaintiff's manager in Toronto, and the production by him of a letter of his written to the General Manager in Montreal, and a letter written in reply by the latter. On a former examination, the production of these letters was refused on the ground that they were privileged as containing an opinion by the plaintiff's attorney as to the validity of the defendant's endorsement on certain promissory notes, which endorsement had been given by another party acting under a power of attorney from the defendant.

Rae shewed cause. The affidavit of the attorney for the Bank shews that the first of these letters was in effect his opinion on the point submitted to him, having been taken down by the writer from his verbal statement, and read over to him before it was despatched, and that when he gave the opinion he was convinced that litigation would spring out of the facts on which it was based. It is also shewn by an affidavit of the Toronto manager, that the letter written in reply to his own was written with reference to the opinion and would certainly disclose it. The letters clearly come within the well established rule that makes communications between attorney and client privileged. This rule is of even wider application than it used to be and now applies to all communications made by an attorney in his professional capacity to his client, even though made with reference to no present or prospective litigation. The authorities are collected in *Mind v. Morgan* L. R. 8 Chy., 361, where reference is made to the wider application of the rule now than in former times. This case has been followed in *Hamelyn v. Whyte*, 6 P. R. 143. The second letter is equally privileged with the first—the opinion was given to the Corporation as a whole, and the letters were both written by its officers and had immediate reference to the same subject-matter.

Bigger contra. The cases relied upon by plaintiff's counsel are all Chancery cases and turn mainly on the question of title. In these cases the liability to produce is much less, and the privilege much wider than in any other. The Common Law jurisdiction as to inspection, under s. 197 of our C. L. P. Act (Imp. Stat., 14, 15, V, c. 99, s. 6) is extended by ss. 189, 190, which are taken from the Imperial Act of 1854 (c. 125, ss. 50, 51), and is now wider than

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the equity jurisdiction as to discovery : *Woolley v. North London Railway Company*, L. R. 4 C. P. 612. It is "limited only by what the Court thinks just," (per Erle, C. J., in *Daniel v. Bond*, 9 C. B. N. S. 716, approved in *Hill v. Campbell*, L. R. 10 C. P. 222). The letters in question were neither written by the solicitor, nor to him. Even should the first letter be considered as coming in effect from him, and being therefore protected from inspection, the second letter could not be viewed in that light. It cannot be maintained that every letter which might be written, containing reference to a solicitor's opinion, is equally privileged with the opinion itself. The question for the Court is whether the ends of justice would be served by the production of the document, and the defendant in this case believed that these ends would be served by the production of the letter, since it would show that the plaintiffs were aware that the party who endorsed the defendant's name on the notes had no power to do so. The rule laid down by Brett J., in *Woolley v. North London Railway Company* has been followed in *Wiman v. Bradstreet*, 2 Chy. Cham. 77, and in *Toronto Gravel Road Co., v. Taylor*, 6 P. R. 227, while the last English case on the subject, *Smith v. Daniell*, L. R. 18 Eq. 649 (July 1874), is strongly in favor of the defendant's contention.

MR. DALTON thought that both letters were privileged under the general rule as to communications between attorney and client. The object of the rule would be defeated if parties were allowed to arrive indirectly at the purport of such communications by obtaining inspection of such documents as those in question in this case.

Summons discharged.

FERGUSON V. ELLIOTT.

Assignment of debt—Pleading.

[Sept. 1, 1876—MR. DALTON.]

This was an action to recover a debt, to which the defendant pleaded assignment of the debt before action. A summons was obtained to strike out the plea on the ground that the name of the assignee should have been given.

Mr. Marsh (Mulock & Campbell) shewed cause, and contended that the statute which makes choses in action assignable at law, 35 Vict., cap. 12, has the effect of making the assignment complete by the mere giving of a writing to the assignee by the assignor. There is therefore no presumption that the debtor is acquainted with the name of the assignee, and he should not be

required to give it. The plea in question is very similar to one alleging that the plaintiff was not the lawful holder in an action on a bill or note.

Monkman, contra, cited Stephen on Pleading, p. 246, to show that either the names of third parties referred to in pleadings should be mentioned, or an allegation should be made to the effect that they are not within the knowledge of the party pleading.

MR. DALTON thought that the principle laid down by Stephen applied to this case, and that the plea should have been drawn in conformity with it. The plea must be amended by stating the name of the assignee, or alleging that his name is not within defendant's knowledge—such amendment, however, only to be permitted on the defendant making an affidavit as to his belief that an assignment has been made. Costs to be costs in the cause.

NOTES OF CASES.

CHANCERY.

ABELL V. MORRISON.

[May 31, 1876.]

Lost Promissory Note.

This was a suit to compel the payment of a certain promissory note made by the defendant to the plaintiff, and by the plaintiff lost after maturity. The defendant allowed the bill to be taken *pro confesso*, and did not appear at the hearing.

SPRAGGE, C., thought that under the circumstances a decree should issue for payment of the amount to be found due without requiring security from the plaintiff.

BLACK V. FOUNTAIN.

[June 21, 1876.]

Insolvency—Fraudulent assignment.

A trader being in insolvent circumstances made an assignment in Nov. 1871 for the benefit of creditors. In March, 1872, Lowe and Smith, two of his creditors, arranged with his other creditors by agreeing to pay 65c. on the dollar, out of moneys to be paid by the insolvent out of the business, and they then ranking as creditors of Fountain for a certain amount. Among the property assigned were two parcels of land, one a lot in Chatham, mortgaged for \$700, and the other a farm lot mortgaged for \$300, in which mortgages the wife of the insolvent had joined to bar her dower. In the assignment it was stipulated that the assignee should obtain an

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absolute release of dower, but the wife objected to this. In the following July another agreement was entered into between Lowe and Smith and the insolvent by which Lowe and Smith's claim was stated and settled and its liquidation provided for. The Chatham lot was to be taken by them at \$1,300 on account of the debt, they assuming payment of the mortgage, and, for the balance \$2,280, a promissory note was given by the insolvent, indorsed by his wife and one Taylor, it being part of the arrangement that the wife should release her dower in the Chatham lot, for which she was to receive an absolute conveyance of the farm lot. The value of the farm lot was shewn to be \$2,000 including the \$300 mortgage.

SPRAGGE, C. In my judgment this transaction was a fraud upon creditors and ought to be set aside as against them, and the decree must be with costs.

Moss for plaintiff.

MacLennan for defendant.

RE O'DONOHUE.

[June 21, 1876.]

Quieting Titles Act.

This was a proceeding to quiet the title of one K. O'Donohue to a lot of land in the Township of Elderslie. The original grant had been made to one Drysdale, his heirs and assigns in fee, but the evidence adduced before the Referee shewed that the grant was intended to be for the benefit of two partners of the grantor as well as the grantee himself. The petitioner claimed title as purchaser at sheriff's sale under a *f. fa.* lands on the 9th of May 1868, one of the execution debtors having died before the writ of *f. fa.* issued, after having executed deeds of assignment of his interest in trust for creditors. The two other parties had entered into contracts for the sale of part of the lot and had also assigned their interests to trustees.

The REFEREE refused a certificate to quiet title, which decision was affirmed on appeal with costs by **SPRAGGE, C.**

Meek for the petitioner.

Ewart contra.

CAMERON V. WIGLE.

[June 21, 1876.]

Railway Company—Compensation for land—Tenant for life.

The owner of land, one Stephen Brooker, devised the same to his wife for life, remainder to his three daughters who conveyed their estate in remainder to the plaintiff and the defendants

Wigle and Quinn. In 1871 the widow conveyed 4 38-100 acres to the Canada Southern Railway Company for the purposes of the road; the Company paying her \$244, which it was admitted by all parties, was a full compensation for the fee in the portion so sold.

SPRAGGE, C. was of opinion that the plaintiff and the defendants, Wigle and Quinn, were entitled to an inquiry of what proportion of the compensation money paid to Eligha Brooker was, at the time of such payment, properly payable to her in respect of her interest as tenant for life, and what proportion was properly payable to the parties entitled in remainder in respect of their interest; and that they were entitled to an order for payment of the latter amount by the Railway Company to them with interest from the date of the payment to Mrs. Brooker.

A. Cameron for plaintiff.

Cattanach for the Railway Company.

PATRIC V. SYLVESTER.

[June 23, 1876.]

Patent of invention—Infringement—Injunction.

This was a bill to restrain the infringement by the defendant, of a patent obtained by the plaintiff in 1869, and renewed on amended specifications in Sept. 1874, for "Improvement on grain and seed drills," and, so far as the suit was concerned, the improvement claimed, consisted of "the novel combination and arrangement . . . of flexible conductor tubes, (*f*) ground tubes, (*g*) chains or analogous suspenders, (*h*) roller, (*i*) draw bars, (*m*) locking stud, (*n*) spiral spring (*o*) pivot connections 1 2 3," the object attained being that, "the union of the ground tubes to the draw bars is accomplished in a manner which will permit the lower end of the tube to give way when coming in contact with a fixed stone, or other serious obstruction, without injury to the tube, which immediately resumes its position when the obstacle is surmounted, and without stoppage of the machine, or demanding any attention of the person in charge. The defendant it appeared had obtained a patent in January 1875, for what he called "Sylvesters improved spring hoe," the only difference as the bill stated, between the pretended invention of the defendant, and that of the plaintiff, being one of mere form, without any material alteration of situation, and without any substantive different combination of mechanism. The defendant objected that plaintiff's patent was void for want of novelty.

PROUDFOOT, V. C., thought it established by

INSOLVENCY CASE; RE HARRIS, AN INSOLVENT.

many cases, that a patent may issue for the combination of previously known implements, or elements. That this must be so, is apparent from the limited number of the mechanical powers though the combinations of them may be very numerous.

Belkune, Q.C., and Moss, for plaintiff.

The Attorney General (Mowat) and Fitzgerald, Q.C., for defendant.

INSOLVENCY CASE.

RE HARRIS, AN INSOLVENT.

Insolvent Act of 1875—What constitutes "default of appointment" of assignor—Interpretation of 33 Vict. cap. 16, secs. 22, 29 and 102.

It is improper for the official assignee at the first meeting of creditors to act as chairman.

When the majority of creditors in numbers vote one way as to the appointment of an assignee, and the majority in value another way, there is not a "default of appointment," and under the circumstances of this case it was properly brought before the Judge, under sec. 102, to decide as to who should be assignee.

A person properly selected as assignee is not ineligible because he is not an official assignee, or a resident of the county.

[Brockville, April 18, 1876.]

The insolvent in February, 1876, made an assignment under the Insolvent Act of 1875 to E. H. W., an official assignee for the County of Grenville. A meeting of the creditors was called for 28th March, to receive statements of the insolvent's affairs and to appoint an assignee, if they should see fit. At this meeting the official assignee was appointed chairman, and acted as such. A motion was made to appoint him assignee of the estate, to which an amendment was moved to appoint one A. M. to that position. Upon a vote being taken 19 creditors representing \$9,384.14 in value, supported the motion; and two, representing \$23,150.00, the amendment. The chairman held that there was "no assignee appointed." (The effect of a default of appointment being that he would, under sec. 29, become assignee.)

Some of the creditors who voted with the majority in value, brought the matter before the Junior County Judge of Leeds and Grenville by petition, asking that he should decide upon the motions respectively, and declare A. M. the duly appointed assignee, or should make an order directing the official assignee to call a meeting of the creditors to appoint an assignee. A summons having been issued returnable on 18th April.

Walker shewed cause. He contended that the matter did not come within the purview of section 102, as no resolutions were moved to be submitted to the Judge; that there was a "default of appointment" under sec. 29, and that the official assignee, therefore, became assignee; that there was no power to appoint A. M. assignee, as he was not an official assignee, or a resident of the United Counties; and that the Judge had no power to command the official assignee to call a meeting to elect an assignee.

Pinhey contra, contended that the words "default of appointment," refer to a case where no meeting has been held, or some similar case. The resolutions voted on at the meeting are brought before the Judge by the petition, and he has a right to decide between them under sec. 102 of the Act.

McDONALD, J. J. (after drawing attention to the fact that the official assignee ought not, under sec. 22 of Act, to have been chairman of the meeting, and commenting strongly upon the impropriety of his occupying that position.) As to the question whether there was a default of appointment under sec. 29, or whether this was a case within sec. 102, my decision is that the words "default of appointment" do not refer to a case where the majority in number vote one way and the majority in value the other way, for I hold that in such an event there is no default but really an election, although the result of that election may not be known, until the judge has decided between the conflicting resolutions, or parties, or, as I might say, upon the double choice. I presume, if a meeting were called, but the creditors entitled to appoint an assignee did not attend, or attending, did not make any appointment, not seeing fit to do so, (see form 9 to Act,) there would be a default, Bumps on Bankruptcy, 466. So if there was a tie in numbers and a tie in value, (of course an exceedingly improbable contingency) there might possibly be a default. But I hold that in this case there was not a default, and that it is my duty to decide under sec. 102, as between the views of each section. Those views as expressed in the resolutions submitted and voted upon at the meeting, are sufficiently brought before me by the petition and the minutes. The latter show that one of the petitioners moved a resolution that the offer of the insolvent be not then accepted, and to adjourn the meeting from the 28th March to the 18th April, and that an amendment, which did not really effect the question of adjournment, but merely the offer of the insolvent, was supported by the majority in number and declared carried. Had

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the meeting been adjourned, ample opportunity would have been afforded for submitting the whole question to the Judge, and having it decided before the time fixed for the adjourned meeting. But the mere fact of a majority voting down a resolution to adjourn, or refusing to embody its views in the shape of resolutions, or taking any other high handed course must not be allowed to defeat the law. I have above stated that I consider the views of each section to be before me, and I think the proceedings taken in this matter have "referred the resolutions with a statement of the vote taken thereon" (sec. 102) to me. I therefore proceed to decide between them, and do decide in favor of the views of the majority in value, and in favor of such majority, and do decide that A. M. is the assignee.

I also overrule the objection that because the candidate of the majority in value is not an official assignee, and is not a resident of these United Counties, he is not eligible to be appointed assignee.

Did I think it necessary so to do I would order M. W. to call a meeting; but I do not. If my decision is correct he is not assignee. If I am wrong, and there was a "default of appointment" by virtue of which he became assignee, the inspectors, or five creditors can require him to call a meeting, which will have power to remove him and appoint another in his stead.

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From the American Law Review.

ACCOUNTANT.—See COSTS.

ACKNOWLEDGMENT.—See DEED.

ACTION.

An action for arrears of a rent-charge upon land in Australia is not maintainable in England.—*Whitaker v. Forbes*, L. R. 10 C. P. 583; s. c. 1 C. P. D. 51.

ACT OF GOD.—See CARRIER, 1.

ADULTERY.—See CONTRACT, 3.

ADVERSE POSSESSION.—See LIMITATION, STATUTE OF, 1.

AFFIDAVIT.—See DEED.

AGENCY.—See PRINCIPAL AND AGENT.

AGREEMENT.—See CONTRACT.

ALTERATION OF CONTRACT.—See CONTRACT, 2.

ANCIENT LIGHTS.

A house with ancient lights abutted upon a street varying in width from thirty-four to thirty-eight feet. An injunction was granted, restraining the erection of a house on the opposite side of the street to a height which would make the angle incidence of light upon the centre of said lights greater than forty-five degrees.—*Hackett v. Baiss*, L. R. 29 Eq. 494.

ANNUITY.—See LEGACY, 2.

APPOINTMENT.

A testator disposed of his property in the following terms: "I give, devise and bequeath all my property, over which I have any disposing power at my decease," to trustees in trust for his wife for life; and after her decease, for all his children equal shares, who should attain twenty-one; and upon failure of children, upon trust for the brothers and sisters of the testator's wife. Under a settlement the wife had an estate for life in certain property, and the testator had a power of appointment among his children. Under the will of T., the testator had a power to appoint certain other property to his wife for life, subject to which power the property was given to his children. *Held*, that the will operated as an appointment both under the settlement and under the will.—*Thornton v. Thornton*, L. R. 20 Eq. 599.

See TRUST, 2.

APPORTIONMENT.—See LEGACY, 2.

APPROPRIATION OF PAYMENTS.

A creditor of a partnership, who is also creditor of one of the partners separately, and has security applicable to both debts, may apply the proceeds of the security to the payment of such debts in any way he may think fit.—See *Ex parte Dickinson*. *In re Foster*, L. R. 20 Eq. 767.

See BILLS AND NOTES, 1, 2.

ARBITRATION.

The plaintiff was the transferee of shares in a company which denied his right to the shares; and the ground of the charge in the plaintiff's declaration was, that the company refused him his right as a member. The company answered, that the cause of action was a dispute between the company and the plaintiff as a member of the company, and by the rules of the company ought to be settled by arbitration. *Held*, that the dispute was not between the company and the plaintiff as a member, and did not fall within the arbitration clause.—*Prentice v. London*, L. R. 10 C. P. 679.

ASSIGNMENT.—See PRIORITY, 2.

ATTORNEY.—See SOLICITOR.

BANKRUPTCY.

1. Certain bankers to whom S. was indebted refused to accept security which S. offered; but they said that circumstances might arise which might make it desirable for them to have it; and S. agreed to let them have it at any time thereafter, if they should desire it. The bankers made further advances,

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and then refused to advance more, and requested S. to transfer said security to them, which S. did. A few days later S. filed a petition for liquidation. *Held*, that the bankers were entitled to hold said security, as there was no fraudulent preference. The bankers were incumbrances acting in good faith and for valuable consideration; and the transaction was not illegal or an evasion of the law.—*Ex parte Hodgkin. In re Softly*, L. R. 20 Eq. 746.

2. In accordance with suggestions of a creditor and under pressure from him, a debtor bought goods from other parties, and with the proceeds of their sale paid off part of said creditor's debt. The debtor became bankrupt. *Held*, that said transaction was in its nature fraudulent, and that the creditor must repay to the trustee in bankruptcy the sum he had received, as it was a fraudulent preference, although made under pressure.—*Ex parte Reader. In re Wrigley*, L. R. 20 Eq. 763.

3. A bankrupt carried on his business for the benefit of his creditors with consent of the trustee. The plaintiff, who became a creditor of the bankrupt after and in ignorance of the bankruptcy, obtained judgment on his debt, and seized a part of the bankrupt's effects which had been acquired since the bankruptcy. *Held*, that in equity the effects seized belonged to the plaintiff.—*Engelback v Nicolson*, L. R. 10 C. P. 645.

See **BILLS AND NOTES**, 1, 2; **LEASE**, 2; **PARTNERSHIP**, 1; **TRUST**, 3.

BEQUEST.—See **DEVISE**; **ILLEGITIMATE CHILDREN**; **LEGACY**; **WILL**, **BILL OF SALE**.—See **FIXTURES**.

BILLS AND NOTES.

1. M. in South America drew a bill on Y. in London, and Y. accepted it. M. then remitted Y. bills of exchange to cover the acceptance. Y. became insolvent before the bill was paid. M. also became insolvent, being indebted to Y. for a sum much larger than the amount of said bill, and executed a composition deed with some of his creditors; but to this deed the indorsee of said bill was not a party. The indorsee applied for an order directing that the proceeds of said remittances should be applied to the payment of said bill. *Held*, that as M. was not in bankruptcy, the remittances were subject to his direction and might be applied to the general balance of his indebtedness to Y., if he should so direct; and that the court had no jurisdiction over the remittances.—*Ex parte General South American Co. In re Yglesias*, L. R. 10 Ch. 635.

2. G. in Malaga was in the habit of drawing bills on Y. in London, and of remitting bills to enable Y. to meet his acceptances. An account was kept of these transactions, entitled "Account No. 1." All other dealings between the parties formed the subject of a separate account, entitled "Account No. 2." Y. transmitted half-yearly accounts made up substantially as follows: Bills accepted were

entered on the debit side, and interest was debited on each bill for the period between the day upon which it would become payable and the day upon which the next half-yearly account was made up. Bills remitted were entered upon the credit side, and interest was credited on each bill for the period between the date of its falling due and the close of the account. If a bill remitted was dishonoured at maturity, then the amount of the bill and interest were entered on the debit side; thus, in substance, striking the bill out of the account. Y. became insolvent, and compounded with his creditors for 3s. 4d. in the pound. Crediting Y. with 3s. 4d. in the pound on his acceptances, the balance was in favour of G. At the time of his suspending payment, Y. held remittances sent him by G. as aforesaid. *Held*, that as Y. was discharged from his liability on his acceptances by the composition, and as the remittances were specifically appropriated to Y.'s acceptances, the remainder of the remittances, after Y. had been reimbursed for the amount he had paid on the bills, belonged to G.—*Ex parte Gomez. In re Yglesias*, L. R. 10 Ch. 639.

3. A bill of exchange was drawn in London by the defendant upon French subjects domiciled in Paris, and was indorsed by the plaintiff. The bill was payable Oct. 5, 1870; but before this date the time for payment and protesting current bills of exchange was enlarged by Napoleon, and again, from time to time, by the French government; so that the said bill did not become payable until Sept. 5, 1871, upon which day it was protested, and notice of dishonor sent all parties. *Held*, that the obligations of the indorser or drawer of said bill were to be measured by the obligations of the acceptor, which were governed by said legislation; and that the defendants were therefore liable in an action brought in England on said bill.—*Rouquette v Overman*, L. R. 10 Q. B. 525.

See **CHECK**; **PRINCIPAL AND AGENT**; **SET-OFF**, 4.

CARRIER.

1. The defendant, who ran a line of steamers from London to Aberdeen, received the plaintiff's mare to be carried to Aberdeen. At a part of the voyage not determined by the evidence, the mare was injured during rough weather, so that she died. The jury found that the injury was caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant. *Held*, that the defendant was liable as an insurer, not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire; and that it made no difference whether the mare was injured within or without the realm. A loss to be caused by the act of God must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and

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skill resist, so as to prevent its effect. Discussion of law of common carriers by water.—*Nugent v. Smith*, L. R. 1 C. P. D. 19.

2. The defendant, whose business it was to move furniture and other goods to all parts of England, agreed in writing to move the plaintiff's furniture, the defendant "undertaking risk of breakages, if any, not exceeding £5 on any one article;" and these terms the plaintiff accepted. The furniture was burned while in transit, without any negligence on the defendant's part. *Held*, that by the contract the defendant was not liable, as he had undertaken the casualty of breakage only; and that it was unnecessary to consider whether the defendant was in the ordinary course of his business a common carrier, as there was a special contract.—*Seafie v. Farrant*, L. R. 10 Ex. (Ex. Ch.) 358.

CHARITABLE TRUST.—*See* TRUST, 1.

CHARTER PARTY.

By charterparty, the cargo was to be loaded on a vessel in thirteen working-days, and to be discharged at not less than thirty-five tons per working-day; ten days' demurrage for all days above said days; charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage. The vessel was detained five days over said thirteen days. *Held*, that the charterer's liability for the demurrage of five days ceased when the ship was loaded. *Quære*, whether a lien is given for all breaches for which the shipowner would have had a remedy against the charterer but for the clause limiting his liability. *Quære*, whether the charterer's liability for unliquidated damages for detention beyond the demurrage days would cease on the vessel being loaded.—*Kish v. Cory*, L. R. 10 Q. B. (Ex. Ch.) 553.

CHECK.

Where the drawer of a check has no funds at the bank at the time of drawing, and had for some months had notice from the bank that no checks of his would be paid unless provided for, it was held unnecessary for the payee to prove presentment and dishonor.—*Wirth v. Austin*, L. R. 10 C. P. 689.

CHURCHYARD.

An English churchyard is the freehold of the incumbent, subject to the right of the parishioner, or stranger happening to die in the parish, to simple interment, but to no more. The incumbent has a *prima facie* right to prohibit altogether the placing of any gravestone, or to permit it upon proper conditions, such as those which relate to the size and character of the stone, the legality or propriety of the inscription upon it, on the payment of a proper fee.—*Sir Robert Phillimore in Keet v. Smith*, L. R. 4 Ad. & Ec. 398.

CLASS.—*See* LEGACY, 3; SETTLEMENT, 4.

COMMERCIAL PAPER.—*See* BILLS AND NOTES; NEGOTIABLE INSTRUMENT.

COMMON CARRIER.—*See* CARRIER.

CONDITION.—*See* CONTRACT, 6.

CONFLICT OF LAWS.—*See* BILLS AND NOTES, 3.

CONSIDERATION.—*See* CONTRACT, 3, 4.

CONSTRUCTION.—*See* APPOINTMENT; CARRIER, 2; CHARTERPARTY; CONTRACT; DEVISE; FIXTURES; ILLEGITIMATE CHILDREN; INSURANCE, 1; LEGACY; PARTNERSHIP, 2; SETTLEMENT; STATUTE; WAY; WILL.

CONTRACT.

1. The defendant, a telegraph manufacturing company, agreed to manufacture a series of submarine cables for the plaintiff, a telegraph company, by a contract containing the following terms: The cable to be laid within ten months; a payment of £40,000 to be made on the order being given for the cable; certain instalments to be paid upon certificates from the plaintiff's engineer that the manufacturer of the cable was making sufficient progress to entitle the defendant thereto; a final payment to be made on the cables being completely laid and certified by the plaintiff's engineer. B. was named in the contract as the plaintiff's engineer. B., who agreed to act as engineer for the plaintiff for a certain commission, subsequently agreed with the defendant to lay the cables for it upon receiving certain payments therefor, to be made upon the receipt by the defendant of the instalments payable by the plaintiff under its contract. The plaintiff paid said £40,000, and subsequently learned of B.'s contract with the defendant. *Held*, that the plaintiff was entitled to a decree for return of said £40,000, and the commission paid B.; and that the contract between the plaintiff and defendant should be rescinded.—*Panama & South Pacific Telegraph Co. v. India Rubber, Gutta Percha, & Telegraph Co.*, L. R. 10 Ch. 515.

2. The plaintiff entered into a written contract to erect buildings on the defendant's land. One of the conditions of the contract made the certificate of the defendant's architect a condition precedent to the right to any payment. The plaintiff was paid for all the works for which the architect gave his certificate, and he brought an action for the value of certain work for which the architect's certificate had not been obtained. Said contract had been kept by the defendant's architect, and had been by him altered in a material part. The plaintiff contended that the contract was therefore void, and that he was entitled to a *quantum meruit* in respect of said work. *Held*, that although the defendant was responsible for said alteration, the written instrument must be looked at to ascertain the terms of the contract, whether the instrument were intrinsically binding or not; and that therefore the plaintiff was not entitled to recover.—*Pattinson v. Luckley*, L. R. 10 Ex. 330.

3. To an action against the defendant as executor on a bond, the executor pleaded that the plaintiff had seduced and committed adultery with the testator's wife, and that it had

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been agreed between the testator and the plaintiff, that if the testator should not make public the plaintiff's conduct, the plaintiff would not sue on the bond; and that the testator had not made the adultery public. *Held*, that there was no consideration for said agreement. Demurrer allowed.—*Brown v. Brine*, 1 Ex. D. 5.

4. The plaintiff contracted to sell the defendant certain iron, deliverable in June, 1873. On June 2, and again in the middle of June, the defendant requested the plaintiff to allow the delivery to stand over; and accordingly nothing was done until Aug. 1, when the plaintiff wrote to the defendant, asking when he would take delivery; the defendant on Aug. 9 asked more time, and the plaintiff waited for a reasonable time, and on Oct. 20, 1874, began this action for breach of contract in refusing to accept or pay for the iron. The defendant contended that there was a substituted verbal agreement not enforceable under the Statute of Frauds. *Held*, that it appeared that there was neither a binding agreement to enlarge the time of delivery, nor a substituted contract; and that damages ought to be estimated according to the price of iron at a reasonable time after the defendant's letter of Aug. 9.—*Hickman v. Haynes*, L. R. 10 C. P. 598.

5. The defendant sold to the plaintiff the exclusive right of using a certain patent in Berlin. At the time of the sale the defendant had no such exclusive right; nor any patent in Prussia; nor could he acquire such patent, as the Prussian government uniformly refused to grant a patent for inventions already patented in a foreign country as this had been. All this was known to the plaintiff; but he purchased the exclusive right with the intention of deceiving the stockholders in a company being formed to use the patent with the belief that the company had such exclusive right; and the plaintiff expected, that if the company were formed, and proceeded to use the patent in Berlin, the company would make profits even without the exclusive right. The plaintiff brought this action to recover the purchase-money paid the defendant on the ground of failure of consideration. *Held*, that as the plaintiff knew all the facts in the case, he got what he paid for, and there was no failure of consideration; and also, that as the plaintiff had paid his money with the purpose of defrauding the intended shareholders in said company, it was money paid in furtherance of a fraud, and could not be recovered back.—*Eggie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491.

6. The defendant agreed to purchase the plaintiff's house and business on a certain future day in the event of the latter being proved by the plaintiff's books to be worth 7*l.* per week. The defendant entered into possession of the plaintiff's premises, and carried on the business, and ultimately sold it. The business was not proved by the books to be worth 7*l.* per week. *Held*, that the defendant, having received a substantial portion of the consideration, could not rely upon the

non-performance of a condition precedent to excuse him from payment of the contract price.—*Carter v. Scargill*, L. R. 10 Q. B. 564.

7. The plaintiff railway company applied to the defendant railway company for a loan, which the defendant agreed to advance upon receiving running powers over the plaintiff's line. The money was advanced, and an agreement entered into, whereby (1) the defendant was to have running powers over the plaintiff's line, subject to such by-laws as the plaintiff should make from time to time; (2) the receipts from through traffic to be divided in certain proportions; (3) the defendant to be at liberty to have their own servants at the plaintiff's stations; (4) a complete system of through booking to be had, whether running powers were exercised or not; (5) the defendant, if using its running powers, to fix the fares, and if the plaintiff objected, the matter to be referred to arbitration; (6) the defendant not to carry local traffic upon the plaintiff's line unless desired so to do, and in such case, to receive fifteen per cent of the local fares; (7) the two companies to send by each other all traffic not otherwise consigned to and from stations on the lines of each other, when such lines formed the shortest route; (8) any difference under this agreement to be settled by arbitration. The plaintiff gave the defendant three months' notice of the determination of the agreement. *Held*, that the agreement was not determinable.—*Llanelli Railway & Dock Co. v. London & North-western Railway Co.*, L. R. 7 H. L. 550; a. c. L. R. 8 Ch. 942; 8 Am. Law Rev. 535.

See BILLS AND NOTES, 3; CARRIER; INSURANCE; LEASE, 1, 3; LIMITATIONS, STATUTE OF, 2; PARTNERSHIP, 2; SETTLEMENT, 5; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER; WAGERING CONTRACT.

COPYRIGHT.

To constitute an infringement under the English Dramatic Copyright Act, a material or substantial part of the copyright drama must be pirated.—*Chatterton v. Cave*, L. R. 10 C. P. 572.

COSTS.

Five guineas per diem allowed a skilled accountant, and two and one-half guineas per diem allowed his clerk, for days upon which they were employed on work necessary and proper to be used in evidence in support of a claim.—*Laflitte's Claim*, L. R. 20 Eq. 650.

DAMAGES.—See CONTRACT 4; NEGLIGENCE.

DECREE.

In a salvage cause, after decree rendered, a mistake was discovered in the value of the vessel and cargo upon which the salvage was estimated. The court re-opened the case and altered its decree.—*The James Armstrong*, L. R. 4 Ad. & Ec. 380

DEED.

An acknowledgment of a deed was taken in

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Pennsylvania before commissioners, who made an affidavit that it was duly taken, but omitted in the affidavit the place where it was taken and the description of the deponent. There was a notarial certificate setting forth the place where the affidavit was taken, and identifying the parties. *Held*, that the defect in the affidavit was supplied by the notarial certificate.—*Re Ann Coldwell*, L. R. 10 C. P. 667.

DELIVERY.—*See* STOPPAGE IN TRANSITU.

DEMURRAGE.—*See* CHARTERPARTY.

DEMURRER.—*See* VENDOR AND PURCHASER.

DEVISE.

1. A testator directed his trustees to divide the income arising from the residue of his estates between all his sons as tenants in common, with benefit of survivorship between them in case any or either of them should die without leaving lawful issue; and, in case any child who should be entitled to any principal money or income should die leaving lawful issue, the principal money, or share from which the interest of such child should be derived, should go to and be divided amongst such issue as tenants in common. Two sons died childless; two sons died leaving issue; and a fifth survived the other four, and died childless. The issue of said two sons claimed the capital sum representing said fifth son's share, against his personal representatives. *Held*, that the issue of said two sons of the testator were entitled to said capital sum.—*Cross v. Malby*, L. R. 20 Eq. 378.

2. In February, 1826, the testator devised all his real estate, "except mortgage and trust estates," and all his personal estate, upon trust for T. and F. He also gave to his trustees all hereditaments whereof he was seized as mortgagee, upon trust upon payment of the moneys due to convey the same to the persons entitled to the equity of redemption; and he directed that the money received should form part of his personal estate. At the date of the will the testator was mortgagee of the Benliffe Estate, under a power-of-sale mortgage, whereby he could, on giving the mortgagor six months' notice, at any time sell the estate. In March, 1826, the mortgagor became bankrupt; and his assignees agreed to sell the equity to the testator, who paid the purchase money and entered into possession. No conveyance of the equity was ever made. In October, 1826, the testator died, leaving J. and C. his co-heirs. The trustees entered into receipt of the rents of the Benliffe Estate and administered them until 1869, when T. claimed one-half of the estate as heir-at-law of the testator. *Held*, that the purchase of the equity of redemption of the Benliffe Estate took the estate out of the operation of the will, and that no dry legal estate with an implied trust for the testator's heirs passed to the trustees; that there was, therefore, intestacy as to the Benliffe Estate, and T.'s claim against the trustees was barred by the Statute of Limitations.—*Fardly v. Holland*, L. R. 20 Eq. 428.

3. Devise of "all that messuage or tenement houses, buildings, farm, and lands, called H., situate in the parish of L., containing by estimation eighty acres, more or less, now in the occupation of C.," to C. C. was, at the date of the will, occupying a farm called H., containing one hundred and seventy-five acres, of which eighty-nine were freehold in the parish of L., sixty-six were copyhold in said county, and the remainder were copyhold in another county. *Held*, that the whole hundred and seventy-five acres passed by the devise.

Devise under a power in a settlement, of "all that messuage or tenement, barn, and lands thereunto belonging, situate in the parish of B., called by the name of Claggetts and Sievelanda." The settlement contained a schedule describing a piece of land by the above name, and subsequently six other pieces of land by different names. At the date of the will, all seven pieces of land were in one occupation, and known as "Claggetts, or Claygate Farm." *Held*, that all seven pieces of land passed by the devise.

Devise of a messuage, farmhouse, lands, and appurtenances, called T., situate in the parish of E., and in the occupation of A. At the date of the will, the T. farm consisted of two hundred and seventy-nine acres, of which one hundred and eighty-three were in the parish of W., and eighty-six in the parish of E. The farmhouse was in W., but the greater portion of the farm-buildings in E. *Held*, that the whole two hundred and seventy-nine acres passed by the devise.—*Whitfield v. Langdale*, 1 Ch. D. 61.

See ILLEGITIMATE CHILDREN; LEGACY; WILL.

DISCLAIMER.—*See* LEASE, 2.

DISEISEIN.—*See* LIMITATIONS, STATUTE OF, 1.

DOCUMENTS, INSPECTION OF.

Where the defendants in an action admitted that certain documents were in their custody, possession, or power, they were not allowed to refuse inspection on the ground that other persons had an interest in them.—*Plant v. Kendrick*, L. R. 10 C. P. 692.

EASEMENT.—*See* ANCIENT LIGHTS.

EQUITABLE MORTGAGE.—*See* PRIORITY, 1.

EQUITY.—*See* BANKRUPTCY, 3; CONTRACT, 1; INJUNCTION; LEASE, 1; NUISANCE, 1; PARTNERSHIP, 2; RECEIVER; SETTLEMENT, 2, 3; SPECIFIC PERFORMANCE; TRUST, 4; VENDOR AND PURCHASER.

EVIDENCE.

1. Goods exposed to easy access by the public were stolen from a railway company. It was *held* that the fact that the company's servants had easier access and greater opportunities of stealing the goods than the public did not raise the presumption that the goods were stolen by the company's servants.—*McQueen v. Great Western Railway Co.*, L. R. 10 Q. B. 569.

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2. The prisoner was indicted for obtaining money from a certain person by false pretences; and also for inserting in a newspaper, with intent to defraud, a fraudulent advertisement, which constituted the false pretences in question. In the course of the trial, two hundred and eighty-one letters, directed to the address given in the advertisement, were offered in evidence. These letters had been stopped by the post-office authorities, and had never been in the prisoner's possession. No proof was offered that the letters were written by the persons from whom they purported to come. *Held*, that the letters were admissible in evidence.—*The Queen v. Cooper*, 1 Q. B. D. 19.

See CHECK; DEED; PRINCIPAL AND AGENT.

EXECUTORS AND ADMINISTRATORS.—See SET-OFF, 2.

FEEs.—See COSTS.

FIXTURES.

The lessee of a public-house borrowed money from M. for the purpose of carrying on his business, and as security for repayment executed a deed-poll, whereby he acknowledged the deposit of the lease as security for the loan and any sums paid "for insuring the premises, fixtures, and fittings therein against damage by fire;" and he agreed to execute on demand a legal mortgage of the premises. Subsequently the lessee delivered to J. a bill of sale, whereby, in consideration of a loan, he assigned to J. all the goods, chattels, property, and effects in and about the premises; and J. was given power to enter and sell. After this the lessee executed a mortgage to M. of the public-house and all the premises demised by the lease, with their appurtenances, together with the lease, according to the agreement in said deed-poll. In this mortgage, no mention was made of fixtures. The fixtures in the house consisted partly of what had been there before the date of the deed-poll, and partly of those which had been added subsequently. J. entered and took possession of the fittings and fixtures, and M. brought a bill in equity to restrain J. from selling. The Bill of Sales Act provides that a bill of sale must be registered, otherwise such bill of sale shall, as against assignees of the effects of the person whose goods are comprised in such bill of sale under the laws relating to bankruptcy, or under any assignment for the benefit of creditors, and as against sheriff's officers, be null and void. Fixtures under the interpretation clause are to be personal chattels. *Held*, that the above provisions of the Bill of Sales Act defining fixtures related only to the cases previously mentioned in the Act, and that said fittings and fixtures passed under the mortgage to M. who was entitled to hold them against J.—*Meux v. Jacobs*, L. R. 7 H. L. 481.

FOOD.—See NUISANCE, 2.

FRAUD.—See CONTRACT, 1, 5.

FRAUDS, STATUTE OF.

The plaintiff contracted verbally with the defendant to sell him twenty-two trees, then

growing on the plaintiff's land, for £26, "the trees to be got away as soon as possible." The defendant had entered and cut six trees, and had agreed to sell the tops and stumps to a third person, when the plaintiff countermanded his sale. The defendant, nevertheless, cut down the remainder of the trees, and removed the whole; and the plaintiff brought an action for trespass, trover, and injury to his reversion. *Held*, that the sale was not of an interest in land within the fourth section of the Statute of Frauds; and that there was a sufficient receipt of said six trees to satisfy the seventeenth section of the statute.—*Marshall v. Green*, 1 C. P. D. 35.

FRAUDULENT PREFERENCE.—See BANKRUPTCY, 1, 2.

HUSBAND AND WIFE.—See SETTLEMENT, 2, 5.

ILLEGITIMATE CHILDREN.

A testator, who had married the day before the date of his will, gave his wife power to dispose by will of his property amongst their children; and in default of such disposal, the testator gave his property equally between his children by his said wife. At the date of the will the testator had two illegitimate children by his said wife. *Held*, that, in default of disposal by the wife as aforesaid, the testator's property was undisposed of by his will.—*Dorin v. Dorin*, L. R. 7 H. L. 568; s. c. 17, Eq. 463; 9 Am. Law Rev. 92.

INJUNCTION.

1. An injunction was granted restraining the defendant from entering upon, or depositing rubbish upon the plaintiff's garden; which acts the defendant was doing in such a manner as to constitute continuing trespasses, under color of an agreement with the occupiers of certain houses which abutted on the garden, to the enjoyment and management of which the occupiers were entitled.—*Allen v. Martin*, L. R. 20 Eq. 462.

2. A. and B., owning distinct properties, brought a bill to restrain a nuisance. A. made out a case, but B. did not. It was decreed that so much of the bill as related to B. be dismissed with costs, so far as occasioned by his joining with A. in the bill; and that an injunction in favor of A. be granted.—*Umfreville v. Johnson*, L. R. 10 Ch. 580.

See ANCIENT LIGHTS; LEASE, 1; NUISANCE, 1.

INSPECTION OF DOCUMENTS.—See DOCUMENTS, INSPECTION OF.

INSURANCE.

1. A vessel was insured from "P. to Newcastle-on-Tyne, and for fifteen days whilst there after arrival." The vessel arrived at Newcastle-on-Tyne, discharged her cargo, was chartered for a new voyage and received part of a cargo, and then moved to a different part of the harbor to complete her loading, and, while there, was damaged by a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy. *Held*, (by KELLY, C. B., and AMPHLETT, B.,—CLEASBY,

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B., dissenting), that the insurance was for a specific voyage which ended when the cargo was discharged, and that the insurers were not liable.—*Gambles v. Ocean Insurance Co.*, 1 Ex. D. 8.

2. Declaration to the effect that the defendant was member of a mutual insurance association, and caused himself to be insured upon a certain vessel, and that the plaintiff subscribed a policy on behalf of the members of the association in consideration of the defendant's agreeing to comply with certain rules which were to form part of the policy. By said rules, the manager was authorized to assess certain contributions upon the members of the association, and, in case of neglect to pay, to sue the delinquent member. The plaintiff was manager, and assessed a contribution on the defendant, which the latter refused to pay. Demurrer. *Held*, that the plaintiff by the terms of the policy was not personally liable; and that therefore there was no consideration between the plaintiff and defendant for the defendant's promise to pay said contributions. Demurrer sustained.—*Evans v. Hooper*, 1 Q. B. D. 46.

3. The plaintiff's effected insurance with the defendant on wool "in all or any shed or store or station, or in transit to S. by land only, or in any shed or store or any wharf in S., until placed on ship." No claim was to be recoverable if the property insured was previously or subsequently insured elsewhere, unless the particulars of such insurance should be notified to the defendant in writing, and allowed by endorsement on the policy. Subsequently the plaintiff's effected insurance on wool "at and from the River H. to S. per ships and steamers, and thence per ships to London, including the risk of craft from the time that the wools are first water-borne, and of transshipment or landing and reshipment at S." Of this insurance the defendant was not notified. It is the practice at S. not to deliver wool which has arrived for shipment direct to the ship for which it is intended, but to convey it to stores belonging to the stevedores of the ship. Receipts are then given by the stevedores, which are regarded as between ship and shipper as equivalent to the mate's receipts; and, in exchange for them, bills of lading are given on demand, whether the wool is in store or on board ship. The plaintiffs forwarded wool from said river to S., and there made a contract of affreightment for its conveyance to London in a certain vessel, and then caused it to be carried to the stores belonging to the stevedores of said vessel, who gave receipts according to the above-mentioned practice. While in the stevedore's store, the wool was burned. *Held*, that the plaintiffs could not have recovered for said loss from the underwriters of the second policy; and that, as subsequent insurance to be within the clause in the first policy requiring notification thereof must be insurance as to a portion of the risks covered by the policy sued on, the plaintiffs were entitled to recover on the first policy.—*Australian Agricultural Co. v. Saunders*, L. R. 10 C. P. (Ex. Ch.) 668.

See *CARRIAGE*, 1; *SET-OFF*, 3.

JUDGMENT.—See *MORTGAGE*.

JURISDICTION.

The claim of a right which is not within the jurisdiction of a court to try cannot oust the jurisdiction of such court, if such right cannot exist in law.—*Hargreaves v. Diddams*, L. R. 10 Q. B. 582. See *Watkins v. Mayor*, L. R. 10 C. P. 662.

See *ACTION*; *BILLS AND NOTES*, 1.

LANDLORD AND TENANT.

The plaintiff, who was standing in a street upon an iron grating serving the double purpose of a coal-shoot and access of light to a kitchen, was injured by the grating giving way. A tenant was in possession of the premises under an agreement by which he covenanted to repair and keep the premises in tenantable repair and condition. The jury found that the grating was in an unsafe condition when the premises were let. There was no evidence that the lessor had any knowledge of the unsafe condition of the grating when the house was let; and the jury found that the lessor was not to blame for not knowing it. *Held*, that the lessor was not liable for the plaintiff's injury.—*Guinnell v. Eamer*, L. R. 10 C. P. 658.

See *LEASE*, 2; *SPECIFIC PERFORMANCE*, 3; *WASTE*.

LEASE.

1. H. agreed to lease to the plaintiff certain premises, the lease to be in the form annexed to the agreement; and it was provided in the agreement that nothing therein should be construed as giving to the plaintiff a right of any easement which did not belong to the premises to be demised as they then existed, nor to any right of light and air derived from over the houses opposite. Subsequently H. granted to the plaintiff a lease of said premises, together with the house erected thereon, "and all cellars, lights, easements, ways, watercourses, privileges, advantages, and appurtenances to the said premises belonging," being in the form annexed to the agreement. H. subsequently leased to the defendants said houses opposite the premises leased the plaintiff; and the defendants pulled the houses down, and began the erection of a new building which was intended to be of a much greater height than the houses. *Held*, that the lease was controlled by the above provisions in said agreement, and that the plaintiff was not entitled to restrain the erection of said building by the defendants.—*Salaman v. Glover*, L. R. 20 Eq. 444.

2. The lessee of a building agreed to underlet a portion of the building to the plaintiff at a much less rent than the lessee was obliged to pay under his lease. The provisions in the agreement were substantially different from those in the lease. The lessee went into bankruptcy; and the trustee, in pursuance of the Bankruptcy Act, disclaimed all interest in the lease. By the act, if a lease was disclaimed, it was to be deemed to have been surrendered. The original lessor brought ejectment against the plaintiff, who then filed

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this bill, praying that the original lessor might be ordered to execute a lease in accordance with the lessee's agreement with the plaintiff, and for an injunction restraining said action. The plaintiff contended that said disclaimer merged the term granted by the defendant in his reversion, subject, nevertheless, to said agreement. Bill dismissed.—*Taylor v. Gillott*, L. R. 20 Eq. 682.

8. An agreement for a lease of mines and minerals provided that the lease should contain all usual and customary mining clauses. *Held*, that the lessor was not entitled to have inserted in the lease a proviso for re-entry on non-payment of rents or royalties, or if and whenever there should be any breach by the lessee of any of the covenants and agreements contained in the lease.—*Hodgkinson v. Crows*, L. R. 10 Ch. 622.

See LANDLORD AND TENANT; SPECIFIC PERFORMANCE, 3.

LEGACY.

1. The testator gave the residue of his property upon trust to distribute the same "to my relatives, share and share alike, as the law directs." *Held*, that the residue must be distributed according to the Statute of Distributions; that is, *per stirpes*, and not *per capita*.—*Fielden v. Ashworth*, L. R. 20 Eq. 410.

2. The testator bequeathed £10,000, with interest on the same at four per cent from his death, to trustees, upon trust to pay the income on certain persons during the life of A., remainder over. The testator's estate was not sufficient to pay his legacies, and the realization of his estate occupied several years. The court directed that all sums applicable to said legacy and received by the trustees should be divisible rateably between capital and income, so that the trustees should pay to the tenants for life four per cent upon every sum invested to answer the legacy.—*In re Tinkler's Estate*, L. R. 20 Eq. 466.

3. A testatrix bequeathed her property "unto and equally between my father and mother, and all my brothers and sisters, share and share alike: nevertheless, I direct that the shares of my said brothers respectively shall not vest in them respectively until they shall respectively attain the age of twenty-one years; and the shares of my said sisters shall not vest in them respectively until they shall respectively attain that age or marry." There were five brothers and sisters living at the death of the testatrix, one of whom, a sister, attained twenty-one in the life-time of the testatrix. After the death of the testatrix, her mother gave birth to another son, and subsequently one of the sons attained twenty-one. *Held*, that the brothers and sisters formed a single class, to which they could be no addition upon one of the class attaining twenty-one; and that, therefore, the brother born after the death of the testatrix took no share of the legacy.—*In re Gardiner's Estate*. *Garratt v. Weeks*, L. R. 20 Eq. 647.

See DEVISE; ILLEGITIMATE CHILDREN; WILL.

LETTERS.—See EVIDENCE, 2: LIMITATIONS, STATUTE OF, 2.

LIBEL.

Libel for the publication of the following words: "W. Science and Art Institute. The public are informed that M.'s connection with the institute has ceased, and that he is not authorized to receive subscriptions on its behalf;" signed by the defendants as officers of said institute; innuendo that the plaintiff falsely assumed and pretended to be authorized to receive subscriptions. The plaintiff had been a master in said institute, had been discharged, and had started a school called the W. Government School of Art, after which the above words were published. The plaintiff never had solicited subscriptions for said institute. *Held*, that there was no evidence of the innuendo, and that the words were not libellous.—*Mulligan v. Cole*, L. R. 10 Q. B. 549.

LICENSE.—See STATUTE.

LIEN.—See CHARTERPARTY.

LIGHT AND AIR.—See ANCIENT LIGHTS.

LIFE-ESTATE.—See LIMITATIONS, STATUTE OF, 1.

LIMITATIONS, STATUTE OF.

1. Lands were settled in trust for A. for life, remainder in trust for B. for life, remainder in trust for B.'s wife for life, remainder in trust for the sons of B. and his wife successively in tail male, remainder in trust for B. in tail general, remainder over. By indenture, made without the consent of A., and reciting contrary to the fact that B. was seised in fee-simple of said lands, B. and his wife conveyed said lands to S. in fee-simple. S. entered into possession in 1835. A. died in 1848, B. in 1859 without issue, and his wife in 1873. *Held*, that S. had been in possession by virtue of the life-estates of B. and his wife, and not as possessor of a base fee, and that he had not acquired a title by adverse possession under the 23d section of the Statute of Limitations.—*Mills v. Capel*, L. R. 20 Eq. 692.

2. After a note was barred by the Statute of Limitations, the maker wrote to the payee as follows: "The old account between us, which has been standing over so long, has not escaped our memory; and as soon as we can get our affairs arranged, we will see you are paid. Perhaps in the mean time, you will let your clerk send me an account of how it stands." *Held*, (by CLEASBY, POLLOCK, and AMPLETT, BB., and GROVE and DENMAN, JJ.,—COLERIDGE, C. J., dissenting), that the letter took the note out of the Statute of Limitations.—*Chasemore v. Turner*, L. R. 10 Q. B. (Ex. Ch.) 500.

See DEVISE, 2; SET-OFF, 2.

MARRIAGE SETTLEMENT.—See SETTLEMENT.

MISJOINDER.—See INJUNCTION, 2.

MISTAKE.—See SETTLEMENT, 3.

MORTGAGE.

A mortgagor covenanted to repay further advances. Further advances were made.

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Held, that the further advances constituted a debt contracted at the date of the mortgage, so far as to prevent the creditor from presenting a petition in bankruptcy against the mortgagee under an act passed after the date of the mortgage, but before the date of a judgment obtained against the mortgagor for the amount of his debt.—*Ex parte Rashleigh. In re Dalsell*, L. R. 20 Eq. 782.

See BANKRUPTCY, 1; DEVISE, 2; FIXTURES; PRIORITY, 1; TRUST, 4.

MOTION.—See SPECIFIC PERFORMANCE, 4.

NEGLIGENCE.

The plaintiff's cattle were being driven along a road which crossed a railway; and while the cattle were crossing the railway, the servants of the railway company negligently let some trucks run down the railway, and frightened the cattle. Several of the cattle escaped, and ran along said road about a quarter of a mile, and then got into an orchard, and through a defective fence on to the railway, where they were discovered dead about four hours after their escape, having been run over by a train. *Held*, that the railway company was liable for the value of the cattle which were killed.—*Sneesby v. Lancashire and Yorkshire Railway Co.*, 1 Q. B. D. 42; s. c. L. R. 9 Q. B. 263; 9 Am. Law Rev. 95.

NEGOTIABLE INSTRUMENT.

Scrip was issued in England by an agent of Russia, by which the holder was to be entitled, after payment of certain instalments, to bonds of the Russian government to the full amount of said instalments. By the usage of bankers and of the stock exchange, this scrip was bought and sold before the bonds were issued, and was passed by delivery as a negotiable instrument. *Held*, that a good title to the scrip passed by delivery to a bona fide holder for value.—*Goodwin v. Roberts*, L. R. 10 Ex. (Ex. Ch.) 888; s. c. L. R. 10 Ex. 76; 10 Am. Law Rev. 120.

NOTARIAL CERTIFICATE.—See DEED.

NUISANCE.

1. The owner of houses sublet to weekly tenants cannot maintain a suit to restrain the noise, steam, and smoke of machinery causing a temporary nuisance. *It seems* that the weekly tenants could maintain the suit.—*Jones v. Chappell*, L. R. 20 Eq. 589.

2. It is a nuisance at common law to expose for sale for human food, cheese which is unfit for human food.—*Skillico v. Thompson*, 1 Q. B. D. 12.

PARISH.—See CHURCHYARD.

PARTIES.—See INJUNCTION, 2.

PARTNERSHIP.

P. By decree in a suit for dissolution of partnership, the business was ordered to be sold as a going concern. By order of the court, an offer of the plaintiff, one of the former partners, to buy the business for £3,000, was accepted; and he was ordered to pay in-

terest upon the purchase-money until paid, and he was to be entitled to possession of the partnership property. The plaintiff entered into possession, but subsequently filed a petition in liquidation. The trustees sold the business for £3,500. *Held*, that the partnership business and effects were in the order and disposition of the plaintiff, with consent of the true owner, at the time of the bankruptcy; and that consequently the £3,500 belonged to the plaintiff's estate, the partnership being entitled to prove for the unpaid £8,000.—*Graham v. McCulloch*, L. R. 20 Eq. 397.

2. Four partners entered into an agreement, wherein, after reciting that they each had considerable sums of money employed in the business, which it might be detrimental for the others to repay immediately upon the retirement or decease of either of them, they agreed, that upon the decease of a partner, the clear balance as ascertained by the last stock-taking, due to such partner, should be repaid out of the business by certain annual instalments, unless the surviving partners should wish to pay such balance at an earlier period, which they might do; and they agreed that the last stock-taking should be conclusive as to the share of the deceased partner, and should be the sum to be paid his executors. *Held*, that the agreement was merely an arrangement for ascertaining and paying the pre-existing joint and several liability of the surviving partners to the estate of a deceased partner, and not an agreement substituting a new liability of the surviving partners, which should be joint only; and further, that if a new liability was treated, this liability was in equity several and not joint only. *Beresford v. Browning*, L. R. 20 Eq. 564. This decision was affirmed on appeal.—*Beresford v. Browning*, 1 Ch. D. 30.

See APPROPRIATION OF PAYMENTS.

PATENT.

A patent for a combination of several parts is not necessarily infringed by using a combination of a portion only of those parts.—*See Clark v. Adie*, L. R. 10 Ch. 667.

POSSESSION, REDUCTION TO.—See SETTLEMENT, 5.

POWER.—See APPOINTMENT; WILL.

PRACTICE.—See COSTS; SPECIFIC PERFORMANCE, 4.

PRESENTMENT.—See CHECK.

PRESUMPTION.—See EVIDENCE, 1.

PRINCIPAL AND AGENT.

M., the plaintiff's traveller, who had often received orders and payments for the same from the defendant, drew a bill payable to "my order," with the drawer's name left in blank, which the defendant accepted, and gave to M. by way of payment of the defendant's account with the plaintiffs. The defendant had previously accepted a bill drawn by M., with the drawer's name left blank, and the plaintiffs had accepted it in payment of a debt, but it did not appear whether such bill was drawn payable to "my order," or to

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"our order." *Held*, that there was no evidence that M. had authority to receive in payment of the defendant's debt a bill payable to "my order."—*Hogarth v. Wherley*, L. R. 10 C. P. 680.

See COMPANY, 4; VENDOR AND PURCHASER.

PRIORITY.

1. P., who was seised of an estate in trust for himself and H., as tenants in common, for several years received the whole of the rents, without accounting for any part of them to H. By his will, P. devised his freehold estate to his wife upon trust to raise an annuity for herself, and subject thereto to her two children B. and C. In 1873 B. and C. deposited the title-deeds of the estate with the plaintiffs, who were ignorant of H.'s interest, as security for a loan. In 1874 H. obtained a decree that the estate of P. was liable to account to H. for one moiety of the rents P. had received, and that H. was entitled to a charge upon the other moiety of the estate in respect of the amounts due H. The plaintiffs then instituted this suit for a declaration, that their security had priority over H.'s charge. Demurrer. *Held*, that the plaintiffs had a prior charge.—*British Mutual Investment Co. v. Smart*, L. R. 10 Ch. 567.

2. Residuary legatees were entitled to a testator's estate subject to an annuity, and a fund was retained in court to provide for the annuity. The legatees assigned their interest in said fund, and subsequently creditors established claims against the testator's estate. *Held*, that the creditors were entitled to payment from said funds in priority to the assignees of the same.—*Hooper v. Smart*, 1 Ch. D. 90.

PROVISO.—*See* LEASE, 3.

QUANTUM MERUIT.—*See* CONTRACT, 2.

RAILWAY.—*See* CONTRACT, 7; EVIDENCE, 1; NEGLIGENCE; TRUST, 4.

RECEIVER.

A suit was brought to rescind a contract for the purchase of a coal-mine from the defendants, who held it under a lease by which they were obliged to keep the mine in operation. The plaintiffs were in occupation of the coal-mine, and in their bill they prayed the appointment of a receiver and manager of the mine. Receiver and manager appointed.—*Gibbs v. David*, L. R. 20 Eq. 373.

RECTIFICATION OF INSTRUMENTS.—*See* SETTLEMENT, 5.

RE-FORMATION OF INSTRUMENTS.—*See* SETTLEMENT, 5.

RENT-CHARGE.—*See* ACTION.

RESCISSION OF CONTRACT.—*See* CONTRACT, 1.

RESIDUARY LEGATEE.—*See* PRIORITY, 2.

SALE.—*See* CONTRACT, 4; FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE, 1, 2; STOPPAGE IN TRANSITU; VENDOR AND PURCHASER.

SALVAGE.—*See* DECREE.

SCRIP.—*See* NEGOTIABLE INSTRUMENT.

SECURITY.—*See* APPROPRIATION OF PAYMENTS BANKRUPTCY, 1.

SET-OFF.

1. Two trustees gave £4,000 to P. for investment in a mortgage. P. only invested £3,050 in the mortgage; but he represented he had so invested the whole of the fund. Subsequently £2,200, part of the sum invested in the mortgage, was paid off, and the money retained with the consent of the trustees for reinvestment; but it never was reinvested, and P. died insolvent. One of the trustees was indebted to P. *Held*, that the debt due to the trustees from P. could not be set off against the debt due from the trustees to P.—*Middleton v. Pollock*, L. R. 20 Eq. 515.

2. An administrator was held entitled to set off the whole of a debt due to the estate against a legacy to the debtor, although part of the debt was barred by the Statute of Limitations.—*In re Cordwell's Estate*. *White v. Cordwell*, L. R. 20, Eq. 644.

3. A policy-holder in a life-insurance company borrowed money of the company on his policy. The company was wound up, and the value of said policy was estimated. The insured died, and the company offered to prove the whole of their loan against his estate. The trustee of his estate claimed a set-off of said estimated value of the policy. *Held*, that there had been no such mutual dealings between the insured and the company as to constitute a case for set-off.—*Ex parte Price*. *In re Lancaster*, L. R. 10 Ch. 648.

4. The holder of a bill of exchange received a dividend from the drawer's estate in bankruptcy, and subsequently sued the acceptor for the whole amount of the bill. The acceptor pleaded an equitable plea, that the holder was suing as trustee for the drawer to the amount of said dividend; and he claimed to set-off a debt due from the drawer to the amount of said dividend. *Held*, that the defendant was in equity entitled to set-off his debt.—*Thornton v. Maynard*, L. R. 10 C. P. 695.

SETTLEMENT.

1. D. agreed to execute a settlement of any property of the value of £100 or upwards to which he should become entitled at any one time and from one source. At this time D. was receiving half-pay as a lieutenant in her Majesty's navy. Subsequently, in accordance with the provisions of a statute, D. commuted his half-pay for the sum of £2,175. *Held*, that the commutation-money was not bound by the settlement.—*Churchill v. Denny*, L. R. 20 Eq. 534.

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2. A carpenter earning 12s. a week had a wife and six young children to support. The court settled upon the wife and children the whole of a fund to which the wife became entitled, without deducting the amount of a debt owed by the husband.—*In re Cordwell's Estate*. *White v. Cordwell*, L. R. 20 Eq. 644.

3. A father induced his son to join with him in a new settlement of estates by representing that he had a power to charge the estates to the extent of £5,000, which power was to be released by the new settlement. The father was mistaken in thinking he had said power. *Held*, that the new settlement must be set aside, although the mistake was innocently made.—*Fane v. Fane*, L. R. 20 Eq. 698.

4. Certain property was settled in trust for E. for life, remainder, after her death leaving a child or children, to all and every the child or children of E., and the issue of such of said children as might be then dead, such issue to take their parent's share equally between them; the shares of sons to be paid to them on their attaining twenty-one, and of daughters on their attaining twenty-one or marriage. E. had six children, five of whom survived her and attained twenty-one; the sixth attained twenty-one, but died childless in E.'s lifetime. *Held*, that said sixth child took a vested interest, as the contingency upon which the gift to the class was to take place was not to be imported into the constitution of the class who were to take under the settlement.—*In re Orlebar's Settlement Trusts*, L. R. 20 Eq. 711.

5. A man who was about to marry a woman owning considerable personal property insisted that any settlement of the property should provide, that in case he survived the woman and there should be no child of the marriage, the fund should be at his absolute disposal. An agreement was signed by both said parties immediately before the marriage, providing that they should join after the marriage in transferring said property to trustees upon trust for the husband and wife during their lives; "the trusts of the capital being for and amongst the children according to the appointment of said husband and wife, or the survivor of them, and in default of appointment, to the children equally; and in the event of there being no children, and of the husband being the survivor, the trust-property to be at his absolute disposal." A settlement was subsequently executed; but it contained no provision for the event of there being no child and the husband dying before the wife. The property was transferred to trustees, and the husband received the income for several years, and died with part of the income in arrear. There was one child of the marriage, who died an infant in the lifetime of both parents. The representative of the husband claimed the arrears of income, and the whole of the property subject to the wife's life-estate. *Held*, that the settlement was not in accordance with the agreement, and must be rectified; and that the wife was

entitled to the arrears of income and to the whole of the property. The transfer to the trustees after the marriage was not a reduction to possession by the husband.—*Cogan v. Duffield*, L. R. 20 Eq. 789.

6. By a marriage settlement, a fund was settled upon the following trusts: To pay the income to the husband during his life, and after his death to the wife for life; and after the death of the survivor, then, in case they should leave issue, who being daughters should marry or attain twenty-one, or being sons should attain twenty-one, to pay the principal equally amongst such issue as they should respectively attain twenty-one or marry; and in the mean time, until such issue should attain twenty-one or marry, to apply the income to the support of said issue: provided, that if any such issue as aforesaid should happen to die before they should respectively become entitled to their portions under the settlement, leaving issue of their respective bodies then surviving, then such last-mentioned issue should take their father's or mother's share or shares equally between them, the same to be paid over, and the interest in the mean time applied, at the time and in the manner limited relative to the original trust-moneys and the immediate issue of the marriage. But in case the husband and wife should die without leaving issue, or their issue should all die before they became entitled to receive their respective portions, and without leaving issue, then over. There were four children of the marriage, of whom two died in infancy in the lifetime of both parents. The third child survived his mother, attained twenty-one, and died a bachelor and intestate in the lifetime of his father. The fourth child attained twenty-one, and survived both parents. The question was, whether the whole fund belonged to the surviving child, or whether the third child acquired an indefeasibly vested interest in one moiety. *Held*, that the fourth child took the whole fund.—*Jeyes v. Savage*, L. R. 10 Ch. 555.

SHAREHOLDER.—See TRUST, 4.

SHIP.—See CARRIER, 1; CHARTERPARTY; DECREE; INSURANCE.

SLANDER.—See LIBEL.

SOLICITOR.

The relation of trustee and *cestui que trust* does not ordinarily exist between solicitor and client, although the solicitor may have received moneys from or for the client.—*Watson v. Woodman*, L. R. 20 Eq. 720.

SPECIFIC PERFORMANCE.

1. An agreement was made for the sale of an estate, the vendor reserving "the necessary land for making a railway through the estate to Prince Town."—*Held*, that the reservation was void for uncertainty, and that the agreement could not be specifically en-

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forced.—*Pearce v. Watts*, L. R. 20 Eq. 492.

2. The defendant agreed to assign his lease of certain premises and to sell certain fixtures to the plaintiff at a valuation to be fixed by L. In a suit for specific performance, a motion was made that the defendant be ordered to permit L. to enter the premises for the purpose of inspecting said fixtures and making an inventory of the same. Order granted.—*Smith v. Peters*, L. R. 20 Eq. 511.

3. An agreement between the owner of a public-house and the assignee of a lease of the same in possession stipulated that a new lease of the premises, to begin on the expiration of the old lease, should be granted by the owner and accepted by said assignee, the rent to be £100 yearly, and the lessee to pay a bonus of £600 upon a day which was fixed for completion of the lease; and it was further agreed; that if from any cause the lease should not be completed on said day, nor said bonus paid, the lessee should pay interest at five per cent from said day until completion. A lease was prepared and sent to the lessee, who never returned it nor paid the bonus, nor was a new lease executed; but he remained in possession for fourteen years after the expiration of the old lease, paying rent at £100 per annum, which was the same in amount as the rent which was payable under the old lease. The lessor died, and her representatives brought a bill for performance of the agreement, and payment of said bonus, with interest thereon at five per cent from the day fixed in the agreement for completion of the lease. *Held*, that the lessee was in possession under the agreement, and not under the old lease, and that there had been no waiver of the agreement. Decree according to the prayer of the bill.—*Shepherd v. Walker*, L. R. 20 Eq. 659.

4. In a redemption suit against a mortgagee in possession of business premises, a compromise was entered into between the plaintiff and defendant, whereby the plaintiff (the mortgagor) was to pay the defendant £4,500 upon a certain day, and the defendant was to pay all sums owed by him, and receive all moneys owed to him, growing out of the occupation of the mortgaged premises. The business was to be carried on by the defendant until the plaintiff paid said sum; and all the expenses of the business incurred after the date of this agreement were to be allowed to the defendant, he accounting for the proceeds of all sales. The plaintiff further agreed to stay proceedings, and the defendant to pay his own costs. The plaintiff failed to pay said sum by the appointed day, and the defendant moved for a decree of specific performance of said contract. *Held*, that the agreement could not be enforced by motion, but only by a bill for specific performance.—*Pryer v. Gribble*, L. R. 10 Ch. 534.

See VENDOR AND PURCHASER.

STATUTE.

The defendant's house, called a "café," was found open, and seventeen females and

twenty gentlemen were there, and were supplied with and paid for cigars, coffee, and ginger-beer, which they consumed. *Held*, that the house fell within a statute requiring a license for "houses kept open for public refreshment, resort, and entertainment."—*Muir v. Keay*, L. R. 10 Q. B. 594.

See FIXTURES; LEASE, 2; MORTGAGE; WAY.

STATUTE OF FRAUDS.—See CONTRACT, 4; FRAUDS, STATUTE OF; VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.—See LIMITATIONS, STATUTE OF; SET-OFF, 2.

STOPPAGE IN TRANSITU.

A. shipped cotton from Charleston for Liverpool under the following arrangement: A. sent to B., his agent at Liverpool, bills of lading of the cotton, under which the cotton was to be delivered at Liverpool to "order or its assigns, he or they paying freight immediately on the landing of the goods." The cotton was consigned to B.; and in the invoice it was described as "consigned to order for account and risk of C." Bills of exchange were also sent to B., who, on the arrival of the cotton at Liverpool, sent them to C. at Luddenden Foot for acceptance; and, upon their return accepted, B. sent the bill of lading of the cotton to C. C. then indorsed the bill of lading to a railway company, who paid charges, and sent the cotton to C. at Luddenden Foot. Said cotton was accordingly delivered to the railway company. C. became insolvent. *Held*, that, upon delivery of the cotton to the railway company, A.'s right of stoppage in transitu ceased.—*Ex parte Gibbes*. In re *Whitworth*, 1 Ch. D. 101.

SURRENDER.—See LEASE, 2.

TAIL, TENANT IN.—See LIMITATIONS, STATUTE OF, 1.

TENANT FOR LIFE.—See LEGACY, 2.

TENANT IN TAIL.—See LIMITATIONS, STATUTE OF, 1.

TRESPASS.—See INJUNCTION, 1.

TRUST.

1. Lands were conveyed to certain persons upon a secret trust for the use of a parish. The rents of the lands were used for nearly three hundred years for charitable purposes. *Held*, that the lands were held subject to a charitable trusts.—*Attorney-General v. Webster*, L. R. 20 Eq. 483.

2. Trustees held a fund in trust for A. in default of appointment by B. B. died, and the solicitors wrote to the trustees, stating that in their belief there was not the slightest ground for supposing that any appointment had been made. The trustees paid the fund into court. *Held*, that the trustees would

have been justified in paying over the fund to A., even though an appointment had been subsequently discovered.—*In re Cull's Trusts*, L. R. 20 Eq. 561.

3. A bankrupt trustee who has trust-money to receive or deal with, so that he can misappropriate it, should be removed from his trusteeship.—*In re Barker's Trusts*, 1 Ch. D. 43.

4. H. held as trustee for the defendants, directors of a railway company, certain certificates of stock in said company, and was registered proprietor thereof. Such stock was issued to registered proprietors, and it was never noticed on the face of the certificates that the proprietor was a trustee. H. obtained advances from R. on deposit of the certificates as security, with a written agreement to execute a valid mortgage and transfer of the stock when requested. R. died without being registered as proprietor of the stock. The defendants discovered the fraud, and gave R.'s widow and executrix notice that H. had been trustee for them. The executrix thereupon obtained from H. a transfer of the certificates to herself; and she subsequently applied for a mandamus, commanding the defendants to register her as the proprietor of said stock. *Held*, that the defendants were entitled to the stock.—*Shropshire Union Railways and Canal Co. v. The Queen*, L. R. 7 H. L. 496; s. c. L. R. 8 Q. B. (Ex. Ch.) 421; L. R. 3 Q. B. 704; 8 Am. Law Rev. 303.

See DEVISE, 2; PRIORITY, 1; SET-OFF, 1, 4; SOLICITOR.

ULTRA VIRES—See COMPANY, 5.

VENDOR AND PURCHASER.

In a bill for specific performance of an agreement to sell certain real estate, the plaintiff alleged, among other things, that the agreement was "signed on behalf of the company [the defendant] by B., the secretary, who was their authorized agent;" and also that the term "vendors," used in said agreement, "is intended to refer to the company, who were, in fact, the vendors of said premises." Demurrer. *Held*, that by the demurrer it was admitted that the vendors referred to in said agreement were said company, and that the agreement must be read as if the name of the company were inserted therein, and that therefore the vendors were sufficiently described in said agreement to satisfy the Statute of Frauds; also that it sufficiently appeared that B. was the company's agent for the purpose of signing said agreement.

It seems that a contract for the sale of real estate signed by an auctioneer on behalf of an unnamed owner is a valid contract under the Statute of Frauds.—*Beer v. London & Paris Hotel Co.*, L. R. 20 Eq. 412.

See FRAUDS, STATUTE OF; SPECIFIC PERFORMANCE, 1, 2; STOPPAGE IN TRANSITU.

VENUE.—See ACTION.

VESTED INTEREST.—See SETTLEMENT, 4, 6.

VIS MAJOR.—See CARRIER, 1.

WAGERING CONTRACT.

To a declaration on a check the defendant pleaded that the check was received by the plaintiff for money alleged to be due upon a wagering contract, whereby the plaintiff was to furnish certain money which the defendant was to use in bets upon the result of certain horse-races; and in case of success the defendant was to pay the plaintiff a certain proportion of the money won, which money was that for which the check was given. *Held*, that the plaintiff was entitled to recover, as he was not claiming under a contract by way of wagering.—*Beeston v. Beeston*, 1 Ex. D. 13.

WASTE.

The erection of buildings upon leased land by the lessee is not waste.—*Jones v. Chappell*, L. R. 20 Eq. 539.

WAY.

A person who allowed trees and underwood on his land to grow across a way was held not to wilfully obstruct the way.—*Walker v. Horner*, 1 Q. B. D. 4.

WILL.

1. Under the direction in a will to pay testamentary expenses and debts, it was held that the costs of an administration suit were included.—*Hawes v. Hawes*, L. R. 20 Eq. 471.

2. A married woman having separate estate, and having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, whom she survived, which disposed of all her property which she then had or thereafter should have. The husband left his wife all his property. After her husband's death, the wife expressed her adherence to the will, but did not re-execute it. *Held*, that the wife's will passed only her separate estate, and did not execute the power of appointment, nor pass property acquired from the husband.—*Willock v. Noble*, L. R. 7 H. L. 580; s. c. L. R. 8 Ch. 778; L. R. 2 P. & D. 276; 8 Am. Law Rev. 545.

See APPOINTMENT; DEVISE; ILLEGITIMATE CHILDREN; LEGACY.

WORDS.

"Entertainment."—See STATUTE,

"Survivorship."—See DEVISE, 1.

"Usual and customary Mining Clauses."—See LEASE, 3.

"Wilfully obstruct."—See WAY.

FLOTSAM AND JETSAM.

FLOTSAM AND JETSAM.

TO THE many members of the legal profession whom the close of the Long Vacation brought back with reluctant steps from seaside or "centennial," it must have been some alleviation of their regrets to observe the changed and beautified aspect of the Hall which is the scene of their toils. The midsummer weeks have been busily employed in imparting a thorough cleansing and renovation to wall, pillar and ceiling, the beneficial effects of which shew that whatever evil associations may cling to political "white-wash," the value of the commercial article is undeniable. New carpets have been laid down in the court-rooms of the west wing, and we hear that in this respect, at least, Law is to follow Equity before long,—thus reversing the time-honoured maxim. We are glad, also, to observe that in beautifying the interior of the Hall, the grounds in front of the building have not been neglected, as their newly gravelled walks and general appearance abundantly testify. The addition to the rear of the main building, now in process of construction by the Government, for the use of the Court of Appeal and the Master in Chancery, is rapidly approaching completion, and may not improbably be ready for occupation by Michaelmas Term. We regret that nothing has been done about a lavatory and other necessary conveniences. Osgoode Hall is in this respect one of the curiosities of the nineteenth century.

This passage occurs in Sir Vicary Gibbs's* argument in the Banbury Peerage:† "Age may not be proof of impotency, but it is evidence of it. The probability of the Earl's begetting a child

at eighty is very slight, and it is not increased by the appearance of another child two years later. Instances have been adduced for these extraordinary births, but none have been cited, in which a man at eighty-two, having begotten a son, had concealed the birth of such a son. Would not he seek publication rather than concealment? Besides, at the birth of children in families of distinction, it is generally an object of much anxiety to have the event authenticated. Some registry is made of it. None has been found here after the most diligent search. If the register is lost, the date may always be supplied by the banquets and festivities with which it is contemporaneous. Why! the whole country would have resounded with the ringing of bells; you would have had processions of old men upon the anniversary of such a prodigy. It would have excited as much surprise as if a mule had been brought to bed? It reminds me of the lines of Juvenal:—

Egregium sanctumque virum si cerno, bimembri
Hoc monstrum puero, vel mirandis sub aratro
Piscibus inventis, et fartæ comparo mulæ.

Sat. XIII. 64.

In no register, in no will, in no document, is there any notice of this wonderful production. And then, not content with one, the miracle must be multiplied. It was not enough that one child should be born to a man at eighty-two; he must have another when he was eighty-four. And nature consummated her prodigality, by lavishing on these children the strength and vigour which she usually denies to the offspring of imbecility."

Demurrers seem from the following report in the *Law Times* to be in *extremis* in England. We must say we do not see, if the parties agree upon the facts, why they should be put to the expense of a trial:—

* At the time attorney-general.

† Reported in an Appendix to Le Marchant's *Gardner's Peerage*, pp. 427, 428.

FLOTAM AND JETAM.

On the first case being opened, which came before the Court on "demurrer" to portions of the plaintiff's statement of facts,

MELLOR, J., observed that the demurrers were what might be called "niggling demurrers"—that is, demurrers rather to the mode of stating the case than to the case itself, and

QUAIN, J., quite concurred in the observation.

Benjamin, Q.C., and *Cohen*, Q.C., the leading counsel in the case, said that they quite agreed in this view, and proposed to strike out the "demurrer," except on the broad ground that the action was not maintainable, which was assented to, and the case, which turned on the construction of a contract, was argued and decided on that footing.

On the next case being opened, which also came before the Court on "demurrer" to the statement of claim—the same counsel being concerned in the case—the same course was taken.

Benjamin said the demurrers were "ridiculous," and the best way would be to strike them out and let the case go to trial, when the broad question could be raised upon the real facts—not the pleader's facts—whether the action was maintainable.

MELLOR, J., observed that this tended to show that demurrers had better be abolished altogether, the only really substantial ground of demurrer being that the action was not maintainable, which could be raised on the real facts stated in a case.

QUAIN, J., observed that this had been found to be the proper course to be pursued under the Common Law Procedure Act—a quarter of a century ago—long before the Judicature Act, and it was strange that under the Judicature Act the old obsolete method of "demurrer" should have been returned to.

It was agreed to strike out the demurrer, and send the case to trial.

"JUST A DREAM, MY LORD."—There is something very beautiful in the exclamations and reflections occasionally given vent to by prisoners on hearing the sentence of the law after their conviction for the offences they have committed. For instance, what can be more touching than the utterance of a man named James Brown, who, at the Dundee Circuit Court, recently, was charged with having (1), on the 8th February, stolen a pair of trousers, a pair of braces, and

penknife from an inn at Letham, (2), with having stolen a filly from a farm at Dunnichen; and (3), with having committed a peculiarly aggravated assault on a woman in the parish of Dunnichen? Brown, against whom there were previous convictions for theft and assault, having pleaded guilty to two out of the three charges now brought against him, was sentenced to fifteen months' imprisonment by the judge, who remarked that "short sentences did not seem to have any effect on him." "Fifteen months," ejaculated Brown, "is just a dream, my lord." The dreams of Brown evidently, like those described by the poet,

"Repeat the wishes of the day.

Tho' further toil his tired limbs refuse,

The dreaming hunter still the chase pursues;

The judge abed dispenses still the laws,

And sleeps again o'er the unfinished cause."

HOW SERGEANT BALLANTYNE MANAGES.—

A correspondent of the *Scotsman*, referring to the debate on the rejected Barristers' Fees Bill, says:—The stories throughout the debate were as numerous as they are at any bar mess, but they did not include one which is fathered on Sergeant Ballantine. This distinguished barrister, as the story goes, was travelling down to his suburban house one night, when a friend asked him how it was that he managed to overtake all his work, and especially how he got on when two cases were called in different courts at the same time. "Well," replied the learned and witty sergeant, "I will give you a sample. To-day I was just in such a fix. One of my clients was a clergyman and the other a railway company, and I thought the best thing I could do was to stick by the railway company, and leave the clergyman to Providence. I won my case." The occupants of the carriage in which they were riding were amused at the division of labour, and were laughing at it somewhat immoderately, when a mild looking stranger in a white neckcloth interposed, and said, "And perhaps you will allow me to add, Mr. Sergeant that we lost ours."

LAW BUSINESS IN ENGLAND. — The *Law Times* says:—When sitting in the Court of Appeal up in a committee room of the House of Lords (where the drawing of corks in the refreshment bar adjoining was distinctly audible), Lord Chief Baron Kelly remarked that we want three more judges and five more courts. We do not

AUTUMN ASSIZES, 1876—CHANCERY AUTUMN CIRCUITS, 1876.

think his Lordship has over estimated the want. The courts are becoming blocked in precisely the same manner as before the passing of the Judicature Acts. In the fond anticipation of getting rapidly to trial, many country cases have been brought to town, and, as Mr. Justice Blackburn remarked a few days since, more new cases are added daily than are disposed of. Further, the lives of the judges at present are far from pleasant. One of them has said that the life is that of a bagman—he never knows in the morning where he will have to attend during the day. Unless Lord Cairns recognizes the machinery, the deadlock predicted by Mr. Justice Grove will become a hideous reality.

ENGLISH SOLICITORS.—The duty on solicitors' certificates—the name of "attorney" no longer being used in legal circles—amounted in the year ended 31st of March last to £94,488. The number practising in the United Kingdom was 14,409.

AUTUMN ASSIZES, 1876.

EASTERN—HON. MR. JUSTICE GWYNNE.

Pembroke	Thursday	Sept. 21st.
Perth	Tuesday	Oct. 3rd.
Cornwall	Tuesday	Oct. 10th.
L'Original	Tuesday	Oct. 17th.
Ottawa	Tuesday	Oct. 24th.

MIDLAND—HON. MR. JUSTICE WILSON.

Napanees	Monday	Oct. 2nd.
Brockville	Monday	Oct. 9th.
Belleville	Monday	Oct. 16th.
Picton	Monday	Oct. 30th.
Kingston	Monday	Nov. 6th.

VICTORIA—HON. MR. JUSTICE PATTERSON.

Lindsay	Monday	Oct. 2nd.
Peterborough ..	Monday	Oct. 9th.
Whitby	Monday	Oct. 16th.
Brampton	Monday	Oct. 23rd.
Cobourg	Wednesday ..	Nov. 8th.

BROCK—HON. MR. JUSTICE MOSS.

Stratford	Monday	Oct. 2nd.
Goderich	Tuesday	Oct. 10th.
Walkerton	Tuesday	Oct. 17th.
Woodstock	Wednesday ..	Oct. 25th.
Owen Sound	Monday	Nov. 6th.

NIAGARA—HON. THE CHIEF JUSTICE OF ONTARIO.

Milton	Tuesday	Oct. 3rd.
St. Catharines ..	Monday	Oct. 9th.
Welland	Wednesday ..	Oct. 18th.
Oryuga	Tuesday	Oct. 24th.
Hamilton	Tuesday	Nov. 7th.

WATERLOO—HON. THE CHIEF JUSTICE OF THE COMMON PLEAS.

Simcoe	Monday	Sept. 25th.
Berlin	Monday	Oct. 2nd.
Barrie	Monday	Oct. 9th.
Brantford	Monday	Oct. 23rd.
Guelph	Monday	Nov. 6th.

WESTERN—HON. MR. JUSTICE BURTON.

London	Monday	Oct. 9th.
St. Thomas	Monday	Oct. 23rd.
Sarnia	Monday	Oct. 30th.
Chatham	Monday	Nov. 6th.
Sandwich	Tuesday	Nov. 14th.

HOME—HON. MR. JUSTICE GALT.

Toronto, (Oyer and Terminer and General Gaol Delivery)	Wednesday ..	Oct. 4th.
Toronto, (Assize and Nisi Prius)	Tuesday ..	Oct. 17th.

N.B.—There shall be in the City of Toronto, Hamilton and London a Jury List and a Non-Jury List. The former shall be first disposed of, and the latter not taken till after the dismissal of the Jury panel, unless otherwise ordered by the Judge.

Mr. Justice Morrison will remain in Toronto during the Autumn Circuit, to hold the sittings of the Queen's Bench and Common Pleas, each week, and for the transaction of business by a Judge in Chambers.

CHANCERY AUTUMN CIRCUITS—1876.

THE HON. VICE-CHANCELLOR PROUDFOOT.

Toronto	Tuesday	Nov. 7th.
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THE HON. THE CHANCELLOR.

WESTERN CIRCUIT.

Stratford	Thursday	Oct. 26th.
Goderich	Tuesday	Oct. 31st.
Sarnia	Tuesday	Nov. 7th.
Sandwich	Friday	Nov. 10th.
Chatham	Tuesday	Nov. 14th.
Walkerton	Tuesday	Nov. 21st.
Woodstock	Friday	Nov. 24th.
London	Wednesday ..	Nov. 29th.

THE HON. VICE-CHANCELLOR BLAKE.

EASTERN CIRCUIT.

Lindsay	Tuesday	Sept. 19th.
Peterborough ..	Friday	Sept. 22nd.
Cobourg	Tuesday	Sept. 26th.
Belleville	Tuesday	Oct. 3rd.
Kingston	Wednesday ..	Oct. 11th.
Ottawa	Monday	Oct. 16th.
Brockville	Monday	Oct. 23rd.
Cornwall	Wednesday ..	Oct. 25th.

THE HON. VICE-CHANCELLOR PROUDFOOT.

HOME CIRCUIT.

Whitby	Tuesday	Sept. 19th.
Barrie	Tuesday	Sept. 26th.
Owen Sound	Tuesday	Oct. 3rd.
Guelph	Friday	Oct. 6th.
Brantford	Tuesday	Oct. 10th.
Simcoe	Tuesday	Oct. 17th.
St. Catharines ..	Friday	Oct. 20th.
Hamilton	Tuesday	Oct. 24th.

LAW SOCIETY, EASTER TERM.

LAW SOCIETY OF UPPER CANADA.

OSGOODE HALL, EASTER TERM, 30TH VICTORIA.

DURING this Term, the following gentlemen were called to the Bar namely:

DANIEL EDMUND THOMSON.
ROBERT PRARON.
HENRY J. SCOTT.
R. MARTIN MERRIDITH.
J. BOND CLARK.
ALBERT MONKMAN.
JAMES LEITCH.
CHARLES J. HOLMAN.
JOHN FISHER WOOD.
THOMAS COCKER JOHNSTON.
HUGH O'LEARY.
EDMUND JOHN REYNOLDS.
PHILIP HOLY.
MICHAEL KEW.
WILLIAM HALL KINGSTON.
ALEXANDER HAGGART.
WILLIAM MYDDLETON HALL.
J. FLINT WHITNEY.
THEOPHILUS H. BACUR.
EDWARD KENNICK.
THOMAS STREET PLUMB.

And the following gentlemen received Certificates of Fitness, namely:

HENRY JAMES SCOTT.
THOMAS HODGKIN.
DANIEL EDMUND THOMSON.
GEORGE W. WELLS.
EDMUND JOHN REYNOLDS.
WILLIAM HENRY ROSS.
WILLIAM CLARK PERKINS.
GEORGE ROSE.
GEORGE S. GOODWILLIE.
JOHN FISHER WOOD.
CHARLES JOSEPH HOLMAN.
ALEXANDER HAGGART.
EUGENE McMAHON.
PHILIP HOLY.
CHARLES H. McCONKERY.
JOHN WALLACE NISBET.
JOSEPH BURGON.
WILLIAM COWAN MOSCOP.
ELIAS TALBOT MALONE.
JAMES FLINT WHITNEY.
GEORGE HOWES GALBRAITH.
THOMAS MERCER MORTON.
SILAS CORRENTY LOCKE.

And the following gentlemen were admitted into the Society as Students of the Law:

Graduates.

MURDOCH MURDO.
WILLIAM JOHN FERGUSON.
CHARLES WENZLEY COLTMAN.
Junior Class.
HENRY WALTER HALL.
CHARLES EDWARD IRVINE.
JOHN O'MEARA.
CHARLES WRIGHT.
FREDERICK WEIR HARCOULT.
DANIEL McLEAN.
JAMES SCOTT.
FRANK JEFFREY HOWELL.
WILLIAM CHALMERS.
ANGUS McCRIMMON.
FREDERICK HERBERT THOMPSON.
RUFUS SHOREY NEVILLE.
ALBERT BERSFORD WOOD.
JOHN BIRNIE.
WALLACE LESLIE PALMER.
FRANK ANDREW HILTON.
FREDERICK W. HARPER.
STEWART CAMPBELL JOHNSTON.
CHARLES HERBERT ALLEN.
HEDLEY VICARS KNIGHT.
HENRY HOBART FULLER.
ROBERT EDSON BUSH.
WILLIAM DAVID SMITH.
WILLIAM FORSYTH MCCREARY.
FRANCIS EDWARD GALBRAITH.
LAWRENCE JOHN MURDO.
JAMES LELAND DARLING.
ROBERT ABERCROMBIE PRINGLE.
ARTHUR WILLIAM GUNDRY.
S. G. MCKAY.
DELOS CHARLES McDONALL.
DANIEL R. CUNNINGHAM.
JENAS DONALD MCKAY.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects namely, (Latin) Horace, Odes, Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 23, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. f., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,

Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR OCTOBER.

1. SUN..16th Sunday after Trinity. Univ. Coll. and Trin. Coll. Mich. Term begins.
2. Mon..County Court Term begins. County Court sittings for trials without jury.
3. Tues..Univ. of Toronto session of Senate begins.
7. Sat....County Court Term ends. Last day for notice for Primary Examinations.
8. SUN..17th Sunday after Trinity. Judges of Supreme Court and Chief Justice Harrison and Mr. Justice Moos, gazetted, 1875.
13. Fri....Battle of Queenston, 1812.
15. SUN..18th Sunday after Trinity. Law of England introduced into Upper Canada, 1792.
22. SUN..19th Sunday after Trinity.
29. SUN..20th Sunday after Trinity.

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THE

Canada Law Journal.

Toronto, October, 1876.

THE interest of the profession in the recent election of Benchers was not very widely extended, for although the ranks of the profession have been increased by several hundreds during the past five years, the number of voters at the last election of Benchers was much less than in 1871. At the first election 461 votes were cast, whilst in 1876 there were only 387. This shows either a growing dislike to the new system, or an indifference which is not encouraging. This falling off was in the face, too, of some correspondence in the public press, which, though not edifying, at least called attention to the fact of the election being at hand. Some may have been disgusted with what seems to be the inevitable result of the elective system wherever applied, and so did not vote at all. At the same time it is pleasant to be able to record that a very creditable election has again been made by the Bar.

Of the 387 ballot papers put in, nineteen were rejected because the names of the voters were not on the register, and two were received too late. The members of one legal firm voted for one dead man, for one who was disqualified, and for two who are ex-officio Benchers, which is an instance of the proverbial ignorance of lawyers of law and fact when they are personally concerned. Hon. M. C. Cameron had the honour of heading the list with 351 votes, followed closely by Messrs. McCarthy, Meredith, S. Richards, D. B. Read, J. D. Armour, Bell, Osler, Becher, etc. Of those who had been appointed by the Benchers to fill vacancies in the past five years all, except two, were re-elected by the Bar.

JUDICIAL DISCRETION.

JUDICIAL DISCRETION.

We do not propose to discuss in this paper that species of discretion, so finely anathematized by Lord Chancellor Camden when he said, "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable." Since his day, judicial discretion has been limited and regulated by written and statute law. In almost every department of law, except, perhaps, in mere matters of practice, there is but slight scope for judicial idiosyncracies. From the individual judge there is always the remedy by way of appeal to a bench of judges. But as we have indicated, there are certain points of practice resting in the discretion of the judge, from whose decision thereon there is ordinarily no appeal. It is regarding these that we intend briefly to consider how the law stands.

In *McDonell v. McKay*, 2 Chan. Cham. R. 243, on an application to amend the bill, the judge before whom the motions came, allowed the applicant to file a further affidavit, and upon this new material granted the motion. It was held by the Court on re-hearing, that the order made being discretionary with the judge, it was not for them to interfere. So in *Chard v. Meyers*, 3 Chan. Cham. R. 120, the judge allowed an appeal to be brought from the master's report, after the usual time therefor had elapsed, and the full Court acting on the same principle, affirmed the order with costs on the re-hearing. It was previously laid down in *Anon.* 12 Gr. 51, that an appeal from Chambers will not be entertained in a matter which rests in the judge's discretion; in that case, the order complained of was one allowing the

defendant in to answer, after the bill had been noted *pro confesso*. The same principle was enunciated by the Irish Court of Appeal in Chancery, in the case of *Re Lawder's Estate*, 19 W. R. 371, and by the English Court of Chancery appeal in *The Republic of Peru v. Renzo*, 22 W. R. 358, when the judge had made an order extending the time to produce. And again by the latter Court in *Ohlsen v. Terrero*, 23 W. R. 195.

In *Sheffield v. Sheffield*, 23 W. R. 378, s. c. L. R. 10 Ch., James, L. J., intimates that there are cases when the Court of Appeal would interfere to prevent a failure of justice, even when the order was in the discretion of the judge below. In that case, Malins, V. C., had refused to dismiss a bill for want of prosecution, when the plaintiff had undertaken, but had failed, to speed the cause. The Lord Justice observed that the judges below might well be trusted to consider the conduct of their own causes. He then pointed out that no question of right is involved, but only one of indulgence, and ends by saying: "I am not inclined to encourage appeals from a decision of the Court upon that which is really a matter of judicial discretion, and upon a matter of what I may call judicial indulgence to the parties."

Since the English Judicature Act, the same practice is observed. In *Golding v. The Wharton Railway*, 20 Sol. J. 391, the matter rose for the first time on an application to strike out some paragraphs of the defence as embarrassing. The Master refused to do so; there was a repetition of this refusal by Mr. Justice Denman in Chambers, and on appeal to the Queen's Bench division, this decision was affirmed. The plaintiff then came to the Court of Appeal and his appeal was dismissed with costs. Mellish, L. J., took the opportunity of stating the principle on which the Court intended to deal with such applications. He said that the judge

JUDICIAL DISCRETION—DOMINION LAW SOCIETY.

in Chambers had to exercise a discretion in the making of orders of this nature, and except in very special cases the exercise of his discretion ought not to be interfered with. The old Court of Appeal in Chancery was not in the habit of interfering with the discretion of the judges of first instance in matters of practice, except where it was clear that injustice would result from the order under appeal, and now that appeals could be brought from all interlocutory orders made in the Common Law divisions, the same rule ought to be followed. Reference may also be made to *Lascelles v. Batt*, 24 W. R. 659, where the appellant court refused to interfere with the mode of trial directed by the judge under the Judicature Act.

In *Runnades v. Mesquita*, 24 W. R. 553, the Court of Queen's Bench lay down an important exception from the general rule. That was an appeal from an order made by Denman, J., in Chambers under order 19, r. 6 of the Judicature Act, ordering the defendant to pay a sum of money into Court as a condition of being allowed to defend the action. Cockburn, C. J., thought the order went too far in imposing such a condition, and said: "We are of course very unwilling to interfere in a matter of discretion where the limit of that discretion may be a matter of opinion. But this is a question coming to us at the beginning of a new system by which further infringements are made than heretofore on the Common Law rights of defendants. Here is a procedure which supersedes all ordinary forms; and in such a case we ought not to hesitate, where we think a discretion has been wrongly exercised, to lay down some kind of rule to point out what we consider to be intended to be the limits within which that discretion is to be exercised." Pollock, B., agreed that interference was proper where the exercise of discretion involved the forma-

tion of a practice under new rules of procedure which may largely affect the rights and liabilities of suitors.

The latest cases decided in the Courts of this Province touching the matter in hand are *Dunn v. McLean*, 6 P. R. 156, and *Bennett v. Tregent*, 25 C. P. 443. The head-note of this latter case is not quite correct in laying down that the Court will not interfere with the exercise of the discretion of the Clerk of the Crown in Chambers. The decision hardly goes as far as this; and the attention of the Court does not appear to have been called to the cases decided in Chancery, where the judges, while affirming the proposition that the discretion of a judge should not be interfered with, have not given effect to the rule in so far as an inferior judicial officer was concerned. We refer to such cases as *Chard v. Meyers* and *Dunn v. McLean*, already cited, and *Scott v. Burnham*, 3 Chan. Cham. R. 399. In *Bennett v. Tregent* the Court go into the merits of the application, and come to the conclusion that the Clerk had not exercised his discretion improperly.

DOMINION LAW SOCIETY.

At a meeting of the Nova Scotia Barristers' Society, held last spring, it was decided to initiate a measure looking forward to the establishment of a Dominion Law Society, and a committee, consisting of Messrs. Eaton, James, Q.C., Tremaine, Miller, Q.C., and Shannon, Q.C., was appointed to correspond with the different Barristers' Societies within the Dominion, and with prominent members of the profession in the other Provinces, in order to obtain information with the view of carrying out the desired object.

Mr. James, Q.C., on a recent visit to Toronto, brought the matter before the Benchers of the Law Society of Ontario.

DOMINION LAW SOCIETY—SUGGESTED AMENDMENTS OF THE LAW.

He also courteously called on us on the subject, and left a circular, of which we append a copy.

The principal advantages which, it is urged, would result from the accomplishment of the scheme, are set forth shortly in the circular. We understand that the proposal made in person by Mr. James was well received by our Benchers, though no definite action has been taken in the matter. The profession in Ontario, we may safely say, would gladly extend any assistance in their power to their brethren in the Maritime Provinces, and an extension of the circle in which one moves does everyone good. Without at present examining the proposed scheme at length, we heartily wish it success; and although we must confess to seeing some difficulties in the way of the proposal, we should all the more like to see it fully discussed, and will be happy to make room for any correspondence on the subject. The following is the circular:

"It is proposed by the Nova Scotia Barristers Society, through the Committee appointed by them for that purpose, to invite the attention of similar Societies in all the other Provinces to the feasibility and desirability of establishing a Dominion Law Society, to meet annually, or bi-ennially, at such time and place as may be appointed.

The chief objects of the Society should be, to discuss orally and by written papers such questions of jurisprudence as may from time to time call for an expression of opinion from the Bar; to assimilate the procedure and practice of the Courts, the *curricula* of legal study, the standards and mode of examination of students, and the tariffs of costs and methods of taxation; to secure the right of counsel in each province to plead in every other province, as occasion may require; to promote the circulation of the best law books and law literature; to arrange a system of reporting decided cases, especially on laws common to all the provinces; and generally to promote the advancement and culture, and raise the status of the legal profession throughout the Dominion.

The establishment of the Supreme and Exchequer Courts calls for a more extended knowledge of general and constitutional law on the

part of gentlemen who shall practice at the Bar, or be elevated to the Bench of these Courts; and the Committee believe that this most desirable object might be more largely promoted through the proposed Society than by any other means.

Among the numerous advantages of the Society, would be the improvement of the profession by giving to each of our leading lawyers, to whom there must necessarily attach so large an influence in public affairs, a Dominion instead of a merely local professional standing; and also a more extended personal acquaintance and social intercourse between the members of the Bar and of the several Provinces.

It would also, it is hoped, aid in the promotion of the study of the English law among the educated French population in Quebec, and the study of the French law and literature among the educated population in the other Provinces.

We beg that you will submit this proposal to the office-bearers of your Society at your earliest convenience, and obtain and forward to me an expression of their opinion on the subject, with such suggestions as may occur to them as to the objects and constitution of the proposed Society.

If these suggestions meet with a favorable reception, we will be happy, at an early date, to take further steps towards the promotion and organization of the Society.

By order of the Committee.

BRENTON H. EATON,
Secretary of Committee."

SUGGESTED AMENDMENTS OF THE LAW.

WE have been requested to publish the following suggestions for amendments of the law. The time is appropriate for such of them as it would be desirable or necessary to introduce (and some of them are both), as the statutes are being consolidated and the House of Assembly will shortly meet. They are as follows:

1. Executions against lands, when placed in the Sheriff's hands, should bind mortgages as well as all other interests in lands, so that the judgment debtor should not be able to assign his mortgage or receive payment of it without satisfying the judgment.

2. An execution against lands placed in the hands of the Sheriff should take

SUGGESTED AMENDMENTS OF THE LAW—LAW SCHOOL.

priority over any prior unregistered conveyance or mortgage of the same lands. At present this is not the case, as the writ binds only the interest which the debtor has in the lands at the time it is placed in the Sheriff's hands.

3. An execution against goods should only bind the same, as against purchasers or mortgagees for value, without notice, from actual seizure, and not from the time of the receipt by the Sheriff. This is the law in England now, and would conform to the spirit of the law of personal property in other respects.

4. An order for the examination of a party, opposite in interest, in a common law suit, ought to be attainable on precept, as in Chancery. This would not increase the number of examinations held at present, and would save much expense and loss of time occasioned by sending to Toronto for the order, which is one almost "of course."

5. Some provision should be made for the examination of the officers of a corporation after a judgment against it. The Common Law Procedure Act, section 287, and the Arrest and Imprisonment for Debt Act, section 41, do not apply to corporations, so that as in the case of a Railway Company no provision exists for ascertaining who are the shareholders of the Company, or which of them have not paid their stock in full, and such a Company can defy the judgment creditor, and the Sheriff too, to reach it by an execution.

6. When a plaintiff obtains judgment by default in a Superior Court upon a writ specially endorsed, for a sum over \$200 but less than \$400, the Deputy-Clerk should have power to tax Superior Court costs upon a proper affidavit being produced and filed with him, showing that the amount claimed was not liquidated or ascertained by the signature of the defendant or by the acts of the parties. At present the plaintiff has to delay the signing of a judgment from two to four days to await the return of such an order from Toronto, being exposed to the risk of an appearance being entered for the defendant in the meantime.

7. Service of issue books should be dispensed with in the County Courts as well as in the Superior Courts; and the

late rules of the latter Courts respecting remanets, and notices of trial of cases left over should be extended to the County Courts.

8. It should be expressly enacted that a release of a married woman's inchoate right to dower should not be regarded as a good consideration for a conveyance to her of real or personal property bought with the money of a debtor, as against the creditors of the latter. At present, a man may sell farm "A" for \$5,000 cash, and purchase farm "B" in the name of his wife and as a settlement upon her, and so defeat his creditors, provided he and his wife swear that the latter only released her dower in "A" on consideration of farm "B" being conveyed to her.

9. It would be better to adopt the law of dower as it is in England, and enact that a conveyance of real estate in the husband's life-time should *ipso facto* defeat the dower. There are very few cases in which dower is not released by the wife as a mere matter of form or under the authority of the husband, and without compensation, while, for the sake of the chance of dower possessed at present by separated and unconciliated wives, it is not worth while to continue a state of the law so anomalous and productive of so much trouble and litigation. These unfortunates can protect themselves better by alimony proceedings if they are unjustly treated.

10. Another anomaly should be removed from our law. A *fi. fa.* lands is held to bind a contingent interest in any land, but not a married woman's right to dower after the right has become an actual one by the death of her husband. See *Allen v. Edinburgh Life Association Co.* 19 Gr. 248.

LAW SCHOOL EXAMINATION.

THE following are the names of the gentlemen who were successful in passing the examinations held at the close of the last session of the Law School:

SENIOR CLASS—T. Ridout, T. E. Lawson, W. W. Ross, D. H. Fletcher, W. Bearsto, J. B. Clark, J. Fullerton, J. S. Whiteside, E. Meyers, J. A. Morlon, E. B. Stone, H. D. Gamble, D. B. Simpson, W. B. Doherty.

LAW SCHOOL, &C.—WINSLOW'S CASE.

Messrs. Ridout, Fletcher, Bearsto and Clark obtained a remission of eighteen months from their time; Messrs. Lawson, Ross, Whiteside and Gamble, twelve months; and the others, six months.

JUNIOR CLASS—W. H. Biggar, R. W. Keefer, O. R. Macklem, J. V. Teetzel, J. C. Ross, J. Campbell, M. Sheppard, Jr., W. E. Higgins, E. Schoff, J. M. Munro, J. W. Holmes, R. Hodge, W. B. Northrup, J. J. Blake.

SELECTIONS.

WINSLOW'S CASE.

The controversy that arose so suddenly, and has been carried on for some months so industriously, between the United States and England, touching the extradition of two forgers, discusses an interesting question of international law, concerning which the only wonder is that it was not settled long ago, and that it takes so much writing to set it at rest now. The question is a simple one: the answer, to an ordinary mind, seems equally so; and the writers on the general subject, have expressed but one opinion upon it, so far as they have expressed any. It is, whether a person, surrendered by one government to another upon charge and proof of the commission of a certain crime, can lawfully, and against the objection of the surrendering government, be tried for a different crime committed before his surrender. That he cannot seems at once the dictate of common sense and of ordinary justice; and so are the authorities. The exigencies of the press require us to write this article,* when, of all the correspondence, only Mr. Fish's despatch of March 31, 1876, to Mr. Hoffman, has been published; and all that we know authentically of the position of the two governments is derived from that able and elaborate paper. Our readers will probably have the advantage of correcting our remarks by the light of fuller knowledge. In these circumstances we shall attempt only to deal with the obvious points of

law; and our text is, that the substance of the English demand appears to be right, but the time and circumstances of its enforcement unreasonable and vexatious; while our government, on the other hand, has taken ground, which, in its generality, international law will not uphold, though we are right in repelling the particular pretension that has been advanced by England. We sincerely hope that good will come out of this discussion, and that the practice of the two nations will now be fixed on a just and honourable basis; and we have every confidence that our representatives will do their full share in reaching this desirable end, which, whenever it comes, will be, in substance, that a surrendered prisoner shall be tried only for a crime included in the treaty under which he is given up, until he has had an opportunity to leave the acquired jurisdiction. The cases which have furnished the occasion of this misunderstanding are those of *Lawrence* and *Winslow*, of which we shall explain the history towards the close of this article; and the English demand is, that in the latter case we shall stipulate to try the fugitive only for the "extradition crime" for which his surrender is demanded.

We hold it to be clear, on ground of reason and authority, that a person surrendered by one sovereign to another, under a treaty of extradition, is to be tried for that crime, and that only, for which his surrender was asked and obtained. It is remarkable that not a word upon this subject is to be found in the works of any of the principal writers in the English language who have treated of international law, public or private. Wheaton and his commentators, Kent, Story, Phillimore, Wharton, Westlake, will be searched in vain for any utterance upon the point. Even Clarke, whose valuable book on Extradition is to our lawyers the principal source of information upon the subject, gives no opinion of his own, though he explains the practice of some countries and the decisions of some courts. The writers of Continental Europe are of one accord in support of the view which we maintain. Thus Fœlix: * "It is also the rule,† that the person whose extradi-

* June 1, 1876.

* Droit Intern. Privé, § 570.

† "De règle."

WINSLOW'S CASE.

tion has been granted cannot be prosecuted and tried, except for the crime for which his extradition has been obtained." To the like purport are Heffter* and Martens.† Each of these authors cites others,‡ whose works are not accessible to us; but their own authority is ample, and no one can doubt that our writers would have accepted it, if their attention had been called to the subject. The rule was so laid down in a celebrated circular issued by the French minister of justice in 1841, to which we shall refer again in a moment. Only two writers in English have said any thing directly upon the matter, so far as we know. Mr. Gibbs, author of a pamphlet published in London in 1868,§ containing many important suggestions which were adopted by Parliament in 1870, after saying that political offences are not a subject for extradition, adds,|| "In close connection with the foregoing principle, and designed undoubtedly to support it, follows another, to which our attention has not been much directed,¶ but which is treated by foreign writers as well established,—that a person surrendered is liable only for the offence on account of which his extradition was obtained." He cites Heffter, and the French circular of 1841, which he calls a manifesto of the French views on the whole subject of extradition, and which he says has had a considerable share in forming the opinion of the Continent. Clarke mentions the circular in somewhat similar terms,** and quotes a passage from it to the same effect, but,†† as we have said, without adding his own opinion. Mr. David Dudley Field says,‡‡ "No person surrendered shall be prosecuted or punished . . . for any offence which was not mentioned in the demand." We understand that Mr. Field in his "Draft Outlines" does not intend merely to state the existing law, but also what he thinks it ought to be; but for this sec-

tion he quotes authority, showing that he considers it already established.

Let us examine for a moment the reason of the rule. Extradition, from being a matter of courtesy between princes, used almost wholly for the confusion of rebels and traitors, has become an important police regulation, never now applied to political offences, but, on the other hand, extended to a great variety of ordinary crimes. The one change is due to the mutations of dynasties since 1789, which have brought home to many ruling powers a sense of the convenience of an asylum; and the other, to the vastly increased intercourse between countries even the most widely separated. It may be said, in general, that the exceptions to extradition, besides mere minor offences not worth the trouble and expense of employing international machinery for their punishment, are of those crimes upon which the laws or sentiments of the contracting nations are not in accord; such as political and ecclesiastical offences, game-laws and revenue-laws. There is one other class, that of crimes committed by soldiers and sailors in service, such as desertion, which are rarely included in treaties, for the reason, perhaps, that although all nations agree in punishing them with great severity, yet all feel that this punishment ought to be applied promptly, and, as it were, at the drum-head, or not at all.

Now, the reason, as Mr. Gibbs intimates, why a person is not to be tried for an offence for which he was not surrendered, is that in no other way can the right of asylum for these excepted crimes be maintained. If a man given up for embezzlement can be hung for treason, or be transported for shooting a rabbit, what becomes of the asylum? It has been said that the question is only one of good faith in asking the surrender. No doubt, if a case shows the absence of honesty from the beginning, the whole world would cry shame upon the government which has been guilty of such fraud. But this is a very inadequate view of the subject. Good faith is not asylum. It is no consolation to a man who is about to be hung for treason, that the government honestly suspected him of having embezzled five dollars; nor is it an answer to the foreign government whose asylum has proved nugatory. The question is one

* French ed. § 63.

† Précis, (ed. 1864) § 101.

‡ Martens cites no less than six.

§ Extradition Treaties by Frederick Wymouth Gibbs, CB. Lond. 1868.

|| P. 30, § iv.

¶ That is, attention in England.

** Clarke, p. 158 (2d ed.)

†† Pp. 161, 162.

‡‡ Draft Outlines of an International Code, p. 123, § 237.

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of right, not of good intentions in a collateral matter. Besides, good faith in this connection means the good faith of detective Bucket or Vidocq, a substance as evanescent as the domicile of a fugitive criminal.

Such being the reason and the opinions of writers of the highest consideration, let us see what is brought to meet them. It appears that in France, where this important principle was first enunciated, the courts acted upon it for a quarter of a century. In 1867, another circular from the minister of justice, who now represented an emperor, and no longer a citizen king, admonished the judges that this was a political matter, and that all the courts could do was to postpone the trial until the government had been applied to. A criminal could acquire, he said, no right against the justice of his country: the tribunal could only try the facts; it could not take cognizance of the conditions upon which extradition had been granted, except upon a notification from the minister of justice.* Mr. Clarke thinks the courts have acquiesced in this view;† but the careful reader of his sixth chapter will find, we think, some reason to doubt his conclusion. It seems to us probable that the highest court of France has not yet yielded its independence to the dictation of executive authority; the last case mentioned by Mr. Clarke having been carefully decided upon its own circumstances, which were held to take it out of the rule. At any rate, the French have not abrogated the rule, but merely changed the department charged with its execution. This may amount to a practical denial of justice in cases which excite no diplomatic interest, as we shall show; but the principle is still fully admitted in France.‡

In the few cases that have been decided within the British jurisdiction and that of the United States, the courts, with some difference of opinion, have, on the whole, followed the later French doctrine, putting it precisely on the French ground, and two of them citing the phrase, that a criminal cannot acquire any right against the justice of his country. Only two of

these cases are reported at any length. The first is *U. S. v. Caldwell*,* decided in 1871 by the same able and learned judge who has lately been called to deal with Lawrence's case. The decision is, that the courts cannot inquire into the alleged breach of international law, but must leave it to the executive department. The other is *Adrianne v. Lagrave*,† in which the Court of Appeals, reversing an able opinion of the Supreme Court, citing *U. S. v. Caldwell*, and quoting much of the French circular, hold that a defendant brought here under the treaty with France is not, by the courts, to be protected from the service of civil process.

It is a matter of surprise that these cases should be cited as deciding a point of international law, when they most explicitly and unmistakably refuse to consider it. That they do not and cannot, according to the opinions of the courts themselves, touch any such point, is well shown by an early case decided before the Ashburton Treaty was made. In *State v. Brewster*,‡ the defendant alleged that he had been illegally brought by the prosecutors from Canada, where he resided; his supposed crime, apparently, having been committed in Vermont, near the border-line; in short, that he was kidnapped. The court held this to be quite immaterial; saying, that, when a prisoner was within their jurisdiction charged with crime, it was not for them to inquire by what means he was brought within the reach of justice. Now, if that case decides that kidnapping is permitted by the law of nations, then *U. S. v. Caldwell*, and others like it, decide that a prisoner may, by international law, be lawfully tried for a crime not mentioned in the proceedings for his surrender; but otherwise they do not. The cases which we have mentioned are all those of which any extended report is given upon this point; but there are notices in Clarke of two cases in Canada which we have examined, and of one in England which is not reported. They shed no light upon the question of international law. It does not appear, however, that the practice of the courts, as far as it has gone, has been

* Clarke, pp. 171, 172. This passage is also cited in the opinion of the Court of Appeals in *Adrianne v. Lagrave*, 59 N. Y. 110.

† P. 174.

‡ See Clarke, p. 176.

* 8 Blatch. 131.

† *Adrianne v. Lagrave*, 59 N. Y. 110, reversing *Bacharach v. Lagrave*, 1 Hun, 689.

‡ 7 Vermont B. 118 (1835).

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to refuse to examine into the nature of the crimes for which a person has been surrendered. This is the decision of a point of criminal law, and is of no intrinsic importance in this discussion, until the practice has become open, general, and notorious, and has been applied to persons in whose fate the surrendering government has deigned to take an interest. After a long acquiescence in such a practice, so applied, it might come to be a part of international law; but it would have obtained that character wholly from the acquiescence. None such has yet been given, or can be pretended.

Take the somewhat analogous case of the capture of a hostile vessel in neutral waters. The mode and place of capture are no defence in the prize court; but the government whose vessel has been taken may insist that the neutral shall interpose. So the accused person, though he may have no standing in court but to the indictment found against him, should have the right to insist that the government which surrendered him shall enforce the immunities of its asylum. This is the general idea in the minds of the courts who have made the decisions. We go farther, and say that the prisoner himself should have this right as matter of strict law. As was said upon another occasion, if this is not the law, it ought to be. This, to be sure, has not much to do with international law directly; but it is an interesting and important matter in its indirect bearing.

It is idle to expect that governments will have the information or the disposition to interpose in ordinary cases; and we venture with diffidence to suggest, that, in constitutional countries at least, the courts should not give up their right to decide such a question. In France, it is tolerably plain, the new order is a device to save trouble, and, in effect, to evade the obligations of the admitted law. The ambassador of the surrendering governments may never hear of the case, or may not care about it; and what the prosecuting government is pleased to call justice will prevail, whatever becomes of the right of asylum. Mr. Clarke has shown, in another connection, how careless all governments are of the rights of their obscure and suspected subjects; and one of the cases commonly cited to prove

the practice in question, that of *Lamirande*, was a clear case of kidnapping, for which no redress was ever obtained. He was stolen from Canada, after a judge of the highest court had intimated that he should release him; and was tried and convicted in France, in contravention of all rules of honour.

Again: the distribution of powers is such in constitutional countries, that the executive department, however well disposed, cannot impose its will upon the courts. It happens fortunately, in Lawrence's case, that the President can act through the prosecuting officers, Lawrence being charged with crimes against the General Government; but in the great majority of instances this would be impossible. Our people have not yet forgotten McLeod's case, which threatened at one time to bring on a war with England on a similar question. Nor is it to be overlooked, that we are so accustomed, in the United States and in England, to defer to the opinion of the courts, that we are in danger of mistaking a refusal by them to decide such a question for a decision of it, of which this discussion furnishes a notable example.

If, however, the practice of the courts has become inveterate, which we are not willing to admit, it is essential that the older treaties should be speedily changed, so as to contain full covenants on this subject; which many of our late treaties, such as that with Italy, do contain. So established, our courts must take notice of them. If murder and forgery and other crimes, for which we are ready to ask and to grant surrender, are to be committed by wholesale, as some late occurrences seem to indicate as probable, there is no objection to providing that any crime within the scope of the treaty may be tried, though not specially noticed in the demand; but this is as much as any government ought to ask or to yield. If treaties are not made, statutes should be passed to give the courts the necessary powers.

England became uneasy on this matter in 1870, and passed a statute forbidding the government to surrender a criminal until assured by the demanding government that he would be tried only for the crime proved against him at the time of his demand; and requiring their own

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courts to observe similar restriction. This law was, in its essence, declaratory only of that which already obtained; but, so far as it required an arrangement with foreign governments beyond what existing treaties called for, it could, of course, have no effect; and there is a somewhat obscurely expressed clause in the statute which appears intended to except them from its operation. At all events, the government of Great Britain made no attempt to apply it to the Ashburton Treaty until the extradition of Winslow was asked for; and thereupon arose the controversy which we hope will be settled to the satisfaction of both parties, before these pages are read.

The case of Winslow is inextricably bound up with that of Lawrence, which is the *fons et origo* of the bitter waters of this dispute. Lawrence is a person who calls himself an Englishman,—we know not with what truth,—and who had lived a long time in New York. He was accused of having defrauded the revenue to an immense extent, and fled to England. Our government produced in England evidence that he had forged twelve or thirteen bonds and other papers; forgery being one of the few crimes within our somewhat old-fashioned treaty. By some mistake of our agents in London, the warrant for Lawrence's extradition mentioned the forgery of only one bond and affidavit. Soon after the prisoner reached this country he was indicted for his frauds, and petitioned the President that he might be tried for the forgery specified in the warrant, and for nothing more. Mr. Bliss, the Attorney for the United States for the Southern District of New York, where the indictments were found, furnished a brief of the cases we have above mentioned, and contended that they warranted the government in trying him for other crimes; though, as we have seen, they have no relation to executive action. The Attorney-General, having been of counsel in the case, took no part in deciding this point; but it seems, by Mr. Fish's despatch, that the Solicitor-General agreed with Mr. Bliss. The President, with admirable good sense, sent orders to have Lawrence tried for the crime mentioned in the warrant, and for no other. Thereupon he was arraigned for that offence, as the district-attorney

understood it; but, taking advantage of some real or supposed ambiguity in the indictment, he pleaded that it set forth a different offence; and the government, instead of taking issue upon the fact, demurred. Judge Benedict reiterated the rule laid down by him in 1871, and, as we understand, for the same reason,—that it was inconvenient and improper for the courts to pass upon the question. Within a short time now past, Lawrence has pleaded guilty to this indictment; admitting, we believe, that it is for the forgery mentioned in the original warrant. To the outside world, it looks as if this plea were part of an arrangement that is to settle all pending cases, including the surrender of Winslow. If so, all's well that ends well.

In the mean time, months had passed since Lawrence was sent to the United States, and he was still awaiting trial; and the rumour filled the newspapers that he was to be tried for all his frauds upon our revenue, whether forgeries or not. And there was abundant foundation for such a report; though, happily, it was untrue. The British government, instead of making Lawrence's case the subject of direct complaint, took the opportunity of our demand for Winslow, whose offences could not possibly be misunderstood or substantially varied in any event, to require of us a conformity with their law of 1870, with which we had no concern, by requiring an assurance that Winslow should only be tried for the forgery or forgeries specified in our demand. They merely referred to Lawrence's case to account for their present action. Our government had a ready answer to the Lawrence allusion; but they did not choose to avail themselves of it, and took the broad ground, which we have ventured to call that of criminal rather than of international law, that, when we hold a man, it is of no concern to any one how we obtained him. As part of a diplomatic discussion, we have no criticism to make upon this reply; but we repeat, that, whatever may be the rights of the party, the surrendering nation has a right to require that its treaty shall not be used for such a purpose in good or bad faith. When this right is finally abandoned, the end of all extradition treaties can be confidently predicted. The United States,

C. L. Ch.] GOLDIE V. DATE'S PATENT STEEL CO.—*Re* ATT'YS.—DAVIS V. CODE.—HARRIS V. PECK. [Ont.

above all other nations, perhaps, certainly above all but England, is interested to maintain the right of asylum inviolate; and we are sure that it will not fail of its high duty in this regard.—*American Law Review*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by G. GIBSON, M.A.
Student-at-Law.)

GOLDIE V. DATE'S PATENT STEEL COMPANY.

Notice of trial pending appeal to higher Court.

A notice of trial given pending an appeal to a higher Court will be set aside for irregularity.

[Sept. 18, 1876.—Mr. DALTON.]

In this case the defendant had obtained a rule in Hilary Term, 1876, setting aside the verdict for the plaintiff, and granting a new trial without costs. The plaintiff gave notice of appeal from this decision, and proceeded to file the usual bond, which was allowed. No further proceedings were taken in prosecution of the appeal, and some months after the allowance of the bond the plaintiff served notice of trial for the Autumn Assizes. A summons having been taken out, to set aside the notice of trial,

J. B. Read showed cause.

H. J. Scott supported the summons.

MR. DALTON.—The notice of trial is invalid, having been served during the pendency of an appeal to a higher Court, and must be set aside with costs.

Order accordingly.

Re ATTORNEYS.

Refusal to make affidavit.—Requisites of affidavit under C. L. P. Act, sec. 188.

[Sept. 19, 1876.—Mr. DALTON.]

Summons to examine a person refusing to make affidavit when required to do so by a party to this matter.

Oslor showed cause and contended that under sec. 188 of the C. L. P. Act, the affidavit on which the application was made should show the nature of the facts with reference to which the person was asked to make an affidavit.

Donovan contra.

Mr. DALTON over-ruled the objection on the ground that all that is necessary is the statement that the person sought to be examined can give valuable information as to the matters in question, and has refused to make an affidavit when required to do so.

Order accordingly.

DAVIS V. CODE.

Examination under Administration of Justice Act.—Defence for time.

[Sept. 22, 1876.—Mr. DALTON.]

Summons for leave to strike out the defendant's pleas and sign judgment.

The action was on a promissory note, and the defendant, on being examined under the Administration of Justice Act, acknowledged that his defence was merely for time, and that he had "no real defence" to the action. The defendant had a plea to the effect that the note was not properly stamped, and apart from the general admission above referred to, there was nothing in the examination to show the falsity of this plea.

Mr. Culver (*Richards & Smith*) showed cause.

Oslor contra.

Mr. DALTON.—If the defendant had merely said that his defence was for time, the plea might have stood, as such a statement said nothing as to the truth or falsity of the defence, but as the strong negative expression that he had "no real defence" had been used by the defendant all his pleas must be considered as proved to be false on his own admission, and must therefore be struck out.

Order accordingly.

HARRIS V. PECK.

Ejectment—Service of issue book—Rule of Hilary Term 1876—Jury notice in ejectment.

Held, that the rule of Hilary Term, 1876, abolishing the use of issue books, applies to actions of ejectment, and that it was within the power of the Court to make such rule.

Seemle, that the notice for jury which by 35 Vict. cap. 19, sec. 1, must be annexed to the issue book in ejectment, may now be served at any time when the issue book could have been served under the old practice.

[Oct. 6, 1876.—Mr. DALTON.]

Ejectment.—A summons was obtained to set aside the notice of trial in this case, on the ground that no issue book had been served by the plaintiff.

Oslor showed cause.

C. L. Cham.]

HARRIS V. PECK—McBRIDE V. HOWARD.

[Ontario.]

Mr. Cowper (Mowat, MacLennan, and Downey), contra, cited *Lesson v. Higgins*, 4 Prac. R. 340 as shewing that the Ejectment Act being now separate from the C. L. P. Act is not subject to sec. 333, subsec 3, of the latter Act, under which the judges are empowered to make rules.

MR. DALTON.—This is a motion to set aside the notice of trial, this being an action of ejectment, on the ground that no issue book has been delivered, and is founded upon the opinion that the Rule of Court of last Hilary Term, by which the practice of delivering issue books is discontinued, does not apply to an action of ejectment. I think that it does apply and that this summons must be discharged.

When the rule of Trinity Term, 1856, (No. 33) which established the practice of delivering issue books, was adopted in this country, the Ejectment Act was incorporated in the Common Law Procedure Act, so that that rule applied to ejectment. There is nothing therefore in the recitals of the rule of Hilary Term last to indicate that it was not meant to apply to ejectment, and the words of that rule comprehend ejectment.

But the power of the Court to make such a rule as that of Hilary Term last is questioned, and it is pointed out that in the Consolidation of the Statutes, the Ejectment Act is dis severed from the C. L. P. Act, and placed in a chapter by itself, and that the powers to make rules given by the C. L. P. Act, are for the effectual execution "of this Act."

Suppose it is to be so—the power to make rules for the practice of the Court when not contrary to any provision of express law, is in the Court and is incidental to its general authority—see sec. 337 of the C. L. P. Act where this power is expressly reserved. More particularly is this so with reference to the action of ejectment which is said to be a creature of the Court, and again this power is expressly reserved by the 77th section of the Ejectment Act.

But then it is urged that the 35 Vict. cap. 19, sec. 1, enacts that the plaintiff may claim a jury, and "shall annex to his issue book, and on the day of service of the same file in the office from which the writ of summons issued" a notice for jury. Certainly the Rule of Court does not repeal the Act, and was not intended to do so, and cannot by implication or otherwise take away the plaintiff's right to a jury. Then if the practice of delivering issue books is dis used by competent authority, what must follow? I may suggest that either the service of the notice may possibly be dispensed with, the plaintiff having filed it, or as the requirement of

the statute that it should be served with the issue book is merely intended to mark the stage of the cause in which the plaintiff should serve the notice, more probably that it would be held that the service of the notice may be made at any time when the plaintiff could, under the old practice, have served the issue book.

I must discharge the summons with costs.

Order accordingly.

IN THE COUNTY COURT OF THE COUNTY OF YORK.

McBRIDE v. HOWARD.

Clerk of the Division Court—Action against.

Held, that it is not necessary in action against a Clerk of a Division Court which charges, that he, "as such Clerk, maliciously, &c., issued a warrant of commitment," to allege that it was so issued without the order of the judge.

This was an action brought against a clerk of a Division Court, the material averment in the declaration being, "that the defendant as such clerk as aforesaid, maliciously, and without reasonable or probable cause, issued a warrant of commitment," (which was set out), and the plaintiff was arrested thereon.

The defendant demurred because the declaration did not aver that the defendant issued the warrant "without the order of the Judge of the said Division Court."

DARTNELL, J. J. I think the declaration shews a good cause of action without these latter words.

The _____ of the Clerk of the Courts are ministerial. He is a public officer, and the provisions of the Con. Stat. U. C., apply to him. The Act requires the declaration to state that the act complained of was committed "maliciously and without reasonable or probable cause." The issuing of a warrant without a Judge's order, would probably be *prima facie* evidence of malice. There was nothing to prevent the defendant from pleading the Judge's order as a justification; or to plead not guilty by statute. In *Dewe v. Riley* 20 L. J. Rep. N.S. C.P. 264, 15 Jur. 1159 and 11 C. B., 434, it was held, that the clerk is a mere ministerial officer, and was not liable in trespass for imprisonment under a warrant reciting a bad order, and that he could plead not guilty by statute, and give the special matter in evidence.

In that case Jervis, C. J., was of the opinion, that the Judge's order was obligatory upon

Chancery.]

NOTES OF CASES.

[Ontario.]

the clerk, even when the order was bad, and to hold otherwise would be to throw upon the clerk the duty of reviewing the decision of the Judge, his superior officer. See also *Andrews v. Harris*, 1 Q. B. 3; *Houlden v. Smith* 14 Q. B. 841.

My judgment is for the plaintiff on demurrer.

The defendant will have leave to plead to this count of the declaration.

Judgment for plaintiff on demurrer.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

CHANCERY.

STANDLY V. PERRY.

[July 8.]

Harbour Commissioners—Nuisance.

In this case, PROUDFOOT, V.C., held that the Cobourg Harbour Company, or the town of Cobourg, who succeeded to the rights of the Harbour Company, were not authorized by the Charter in stopping up any of the streets or highways; neither were they at liberty to erect a fence or place a building on the accretions made to a highway, in such a manner as to prevent the plaintiff, whose land fronted on such highway, from having free access thereto.

Armour, Q.C., for plaintiff.

S. Smith, Q.C., and *Boyd*, Q.C., for defendants.

SWITZER V. McMILLAN.

[September 15.]

Lease by Guardian of Infant.

The Court, on appeal from the Master at Guelph, held that the guardian of infants cannot create a valid lease of the estate of the infants, without first obtaining the sanction of the Court thereto.

W. Cassels for appeal.

Small contra.

DOMINION SAVING AND INVESTMENT SOCIETY
V. KITTRIDGE.

[September 22.]

Paying off mortgages—Burden of costs.

The plaintiffs held two mortgages on two distinct parcels of land, created by one Loughhead.

The defendant being about to purchase one of these parcels, wrote to the secretary of the Society, "Please let me know the amount of your mortgage from J. G. Loughhead, on lot 29, . . . how it is made up, etc., as I would like to take it up." In answer to this, the secretary of the Society wrote that \$741 would pay off J. L.'s loan on the lot named. Subsequently the defendant, in answer to a letter written by the Society to J. L., transmitted \$193 as being the amount claimed to be their due, and payable to the Society on this lot, and saying, that he sent it as payment on the lot, but claiming that he should not pay all the costs. The secretary of the company wrote an answer saying, that J. L. had desired that all costs should be charged against this lot. It was held, under these circumstances, that the Society could not afterwards insist upon the defendant, who had purchased the equity of redemption in this lot, paying what was due upon both lots before he could claim a discharge of the mortgage on the lot purchased.

Boyd, Q.C., for plaintiff.

Mages for defendant.

SMILES V. BELFORD.

[September 25.]

Copyright—Injunction.

The Court on motion for decree determined that it was not necessary for the author of a work published and duly copyrighted in England, to republish or reprint and register his book in this country to enable him to restrain a person in this country from printing such work.

Miller and Biggar for plaintiff.

Beaty, Q.C., and *Hamilton* for defendant.

LITTLE V. WALLACEBURGH.

[September 25.]

Municipal officers—Injunction.

In this suit PROUDFOOT, V.C., refused to restrain the defendants, the Town Council of Wallaceburgh, from changing the site of a proposed market and town hall; the Vice Chancellor observing: "I think if the Corporation buys property for the site of a town hall, and no change of circumstances is made on the faith of it, the same body may, before building at all events, change the site."

Bethune, Q.C., and *Moss* for plaintiffs.

Boyd, Q.C., for defendants.

NOTES OF CASES—DIGEST OF ENGLISH LAW REPORTS.

VICTORIA MUTUAL FIRE INS. CO. v. BETHUNE.

[September 25.]

Administration of Justice Act—Injunction.

The plaintiffs had effected an insurance in favour of one Clark, whose goods were destroyed by fire, and referees awarded him a sum of money which the plaintiffs were ready to pay over, but having been served with garnishee proceedings, at the instance of the defendant Bethune, they had refrained from paying over the amount, and orders were made by the Judge of the County of Wentworth, in favour of Bethune and seven other creditors to an amount of \$582.97, being the full amount of the money remaining in the hands of the plaintiffs, as payable to Clark, and Bethune had issued an execution against the plaintiffs, and the sheriff had seized under the writ. It also appeared that the Judge of the County of Essex had granted a similar order for \$208 debt, and costs \$38.11, so that the sums ordered to be paid by plaintiffs exceeded the amount in their hands by about \$240; thereupon plaintiffs applied to the Judge of Wentworth for an order to rescind his orders so far as plaintiffs were prejudiced thereby, which application the Judge refused to grant on the ground that he had not any authority to rescind his order. Under these circumstances the plaintiffs filed a bill in this Court for an order to continue an interim injunction restraining proceedings on such orders, but

PROUDFOOT, V.C., refused the motion, observing: "The Administration of Justice Act applies to County Courts, and in the proceedings in Essex all the claimants might have been summoned under the act of 1873, (sec. 8) and a judgment or decree made adjusting all the rights of the parties. If dissatisfied with the decision it might have been appealed from."

*Walker for plaintiffs.**Crickmore and Moss, contra.*

HOWEL'S State Trials, 207. A curious illustration of the extreme barbarity of the spirit of British criminal law, in cases not capital, is shown in a law which was repealed scarcely fifty years ago, enacted, we believe, in the time of Edward VI., and which provides that every person "convicted of drawing or smiting with a weapon in a churchyard is to have one of his ears cut off; and if the person so offending have none ears whereby he should receive such punishment, then" the letter F was to be branded in the cheek with a hot iron, so that he might be known for a fray-maker and fighter. Nothing can more forcibly illustrate the practical savagery of the times than that the law-maker was obliged to contemplate the probability of finding culprits whose ears have already been cut off.

DIGEST.

DIGEST OF THE ENGLISH LAW REPORTS

FOR FEBRUARY, MARCH, AND APRIL, 1876.

*From the American Law Review.*ACCOUNT.—*See* APPROPRIATION OF PAYMENTS.ACKNOWLEDGMENT.—*See* LIMITATIONS, STATUTE OF.

ADMINISTRATION SUIT.

P. died in 1740, and his assets were apportioned among the creditors who were then found. The funds then distributable were insufficient to pay the creditors in full. In 1867 a large sum was paid into court to the credit of P.'s estate, and certain creditors of P.'s estate presented their claims. *Held*, that said creditors were only entitled to such a proportion of said sum as their debts bore to the total indebtedness of P.'s estate, and that the remainder of said sum must be retained to meet any future claims of other creditors.—*Ashley v. Ashley*, 1 Ch. D. 243.

AGENCY.—*See* BROKER; CONTRACT, 3; PRINCIPAL AND AGENT.AGREEMENT.—*See* CONTRACT.

APPOINTMENT.

E., who had power of appointment by will over £7,000, appointed to various persons £1,995, £4,000, £4,000, and £5, being £10,000 in all. An appointee of £4,000 died in the testator's lifetime. *Held*, that the other appointees, and not the persons entitled in default of appointment, were entitled to the benefit of the lapse. Appointees of life and reversionary interests were ordered to bring their interests into hotchpot.—*Eales v. Drake*, 1 Ch. D. 217.

See SETTLEMENT, 1.

APPROPRIATION OF PAYMENTS.

A. & B., partners, gave their acceptance to the plaintiffs for £132 for goods sold. A. & B. dissolved partnership, and informed the plaintiffs of this, and that A. would carry on the business, and pay and receive the partnership debts. After this the plaintiffs sent A. an account headed, "A., debtor to plaintiffs," putting the acceptance of A. & B. for £132 first, and then an acceptance by A. only; and on the credit side various payments amounting to £97, and showing a balance against A. of £92. Afterwards A. made payments, which, with the other payments, amounted to more than £132. The plaintiffs sued on the acceptance for £132, and A. pleaded payment. *Held*, that the payments made must be applied to the debts in order of date, as the plaintiffs had blended the accounts of A. & B., partners, and of A.; and

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that the plea was sustained.—*Hooper v. Keay*, 1 Q. B. D. 178.

ASSIGNMENT.—See **BANKRUPTCY**, 3, 7, 8;
EJECTMENT; **VOLUNTARY SETTLEMENT**.

BANK.

A company was incorporated, and a prospectus issued soliciting persons to become shareholders, and deposit £1 per share, the N. Bank being described as the bank of the company. The result of the prospectus was, that £4,000 were paid into the N. Bank. The bank received a note from W., a member of the company, who signed it as secretary, enclosing a copy of a resolution alleged to have been passed by the company. The resolution was, "that the N. Bank be requested to pay all checks signed by either of the two of the following directors, A., B., and C., and countersigned by the secretary." The signatures of A., B., and C., corporators of the company, were attached to the resolution. The bank accordingly, in good faith, paid out the £4,000 on checks received from time to time, and signed as aforesaid. It subsequently appeared that there had been no meeting of shareholders, and that no directors or secretary had ever been appointed; but that A., B., C., and W. had attended at the company's office, and had acted as directors and secretary of the company. The company went into liquidation: *Held*, that the £4,000 could not be recovered from the company by the official liquidator.—*Mahony v. East Holyford Mining Co.*, L. R. 7 H. L. 869.

BANKRUPTCY.

1. Certain traders being in contemplation of bankruptcy, and wishing to raise money, instructed S. to draw bills on them, which they accepted. S. then sold the bills, amounting to £1,700, to one Jones for £200. Jones knew that the acceptors would be unable to pay in full; but he learned that the acceptors had assets, and that there was a fair chance of his obtaining payment of part. Three days after Jones purchased the bills, the traders became bankrupt. *Held*, that, under the circumstances, Jones must be held to have had knowledge of the fraudulent nature of the bills, and that he could prove for £200 only.—*In re Gomersall*, 1 Ch. D. 137.

2. A debtor executed a bill of sale to a creditor of substantially the whole of his property, not including his book debts. The creditor at the same time agreed verbally to supply more goods on credit to the debtor, to enable him to carry on his business; and subsequently the creditor, in fact, supplied the goods. *Held*, that the bill of sale did not constitute an act of bankruptcy.—*Ex parte Winder*. *In re Winstanley*, 1 Ch. D. 290.

3. One of two partners in trade assigned all his assets to his separate creditor, and gave him a power of attorney to assign all his personal property to which he should become entitled before the debt was paid. There was a proviso avoiding the assignment in case the

debtor should pay his debt on demand when the creditor should so require in writing, and should in the mean time, until payment of the debt, pay interest thereon half-yearly, and also a proportionate part thereof to the expiration of said notice, when the same should be given; and, in case default should be made in payment of the debt as aforesaid, the debtor was authorized to take possession of and sell the assigned property. The partnership was insolvent at the time of the assignment. *Held*, that the assignment was an act of bankruptcy. It seems that the debtor was not entitled to make a demand of payment, and, in case of default, take possession the same day.—*Ex parte Travor*. *In re Burgard*, 1 Ch. D. 297.

4. A husband, and his wife who was under age, executed a deed of the wife's real estate; but the wife did not acknowledge the deed. The husband kept the purchase-money. On attaining majority, the wife refused to confirm the conveyance, unless the husband should give a bill of sale of his furniture to secure payment of £425 to a trustee for her benefit. This arrangement was carried out, and a fork was given to the trustee in the name of the whole of the furniture, and the keys of the dwelling-house containing the furniture. The furniture remained in said house, which was occupied by the husband and wife. The husband became bankrupt, and his trustee claimed the furniture. *Held*, that the wife's trustee was entitled to the furniture.—*Ex parte Cox*. *In re Reed*, 1 Ch. D. 302.

5. Property acquired by a bankrupt after the bankruptcy has been closed, and before the bankrupt's discharge, does not belong to the trustee in bankruptcy.—*In re Pettit's Estate*, 1 Ch. D. 478.

6. Creditors of a debtor who had filed a liquidation petition agreed to accept a composition, payable in three instalments guaranteed by R. R. had previously refused to guarantee payment, unless the debtor gave him security. The debtor gave R. the security; R. guaranteed payment of the instalments; the debtor accepted the composition. The first instalment was paid; but the debtor could not pay the second, and filed a second liquidation petition; and R. paid the third instalment. R.'s arrangement with the debtor was not known to the creditors. The debtor's trustee under the second liquidation claimed the security given to R. *Held*, that R. was entitled to retain his security.—*Ex parte Burrell*. *In re Robinson*, 1 Ch. D. 537.

7. A debtor, under threat of legal proceedings if he did not pay his debt, wrote to his creditor, "In consideration of your delaying legal proceedings, I hereby transfer to you 500 tons of coals which are on my wharf, the proceeds of which coals shall be handed to you till my debt to you is liquidated." This letter was immediately registered as required by the Bills of Sale Act. The next day the debtor filed a liquidation petition. The day after this, the creditor sent a man, who took

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possession of the coals, but was ejected by the debtor. *Held*, that the letter constituted an equitable transfer of the coals; that the creditor was entitled to demand possession; and that, after he took possession, the coals ceased to be in the order and disposition of the debtor with consent of the true owner; and that, therefore, the creditor was entitled to the coals against the debtor's trustee in bankruptcy.—*Ex parte Montagu. In re O'Brien*, 1 Ch. D. 554.

8. Creditors to whom £287 were due agreed to give the debtor further time and further credit for goods to be supplied by them, so that the whole amount owing should not exceed £500, upon having the moneys owing or to become owing secured by an assignment of the whole of the debtor's property. The debtor made the assignment, and received advances to an amount exceeding in all the £500. *Held*, that the assignment was not an act of bankruptcy. *Ex parte Sheen. In re Wisstanley*, 1 Ch. D. 560.

9. At a meeting of creditors of a bankrupt, it was agreed that a composition of 3s. in the pound should be accepted in satisfaction of the bankrupt's debts; that such composition should be payable by three instalments, in three, six, and twelve months; and that S. be accepted as security. The plaintiffs accordingly received three joint and several notes signed by the bankrupt and S. for the amount of their debt; and they signed a receipt for the notes, expressed as "being a composition of 3s. in the pound, and in discharge of our debt." The first note was not paid, and the plaintiffs brought an action for the whole of their original debt without having called upon S. *Held*, that the plaintiffs were entitled to maintain the action. The composition was accepted in discharge of the debt, and composition involves the fact of payment.—*Edwards v. Hancher*, 1 C. P. D. 111.

10. M. handed the defendant a bill of lading of certain cases of brandy, and requested him to land and warehouse the brandy in his own name. This the defendant did, and paid the expenses. A few days later, a bill given by M. for the hire of a vessel from the defendant fell due; and the defendant, at the request of M., took M.'s acceptance at seven days for the amount of said bill and said expenses, on receiving authority from M. to sell the brandy if the bill should not then be paid. The bill was not paid; and the defendant sold the brandy, which was, in fact, the whole property of the defendant. M. went into bankruptcy; and his trustee brought trover against the defendant for conversion of the brandy, on the ground that there had been a fraudulent "conveyance, gift, delivery, or transfer" within the Bankruptcy Act, 1869, § 6, subs. 2. *Held*, that the transaction was not within the act, and was valid.—*Philps v. Hornstedt*, 1 Ex. D. 62; s. o. L. R. 8 Ex. 26.

See CUSTOM; MORTGAGE, 1; VOLUNTARY SETTLEMENT.

BARRATRY.—See DANGER OF THE SEAS.

BEQUEST.—See CHARITABLE BEQUEST; CONDICTION, 1; DEVISE; ELECTION, 1; EXECUTORS AND ADMINISTRATORS; ILLEGITIMATE CHILDREN; LEGACY; MARSHALLING ASSETS; WILL, 3.

BILL IN EQUITY.

An original bill was filed in England by a foreign republic; and a cross-bill was filed by E., one of the defendants, against the republic and its president, making the president a defendant for the purposes of discovery. E. then made a motion that the original suit might be stayed until the defendants in the second suit had appeared and answered. Motion refused. It seems that the republic was bound to produce some person who can give the proper discovery.—*Republic of Costa Rica v. Erlanger*, 1 Ch. D. 171.

BILL OF LADING.—See DANGER OF THE SEAS.

BILLS AND NOTES.

The holder of a dishonored bill of exchange released his claims against the acceptor, but reserved "his entire claims against any obligants other than the acceptor." *Held*, that, as the acceptor of the bill was not discharged from his liability to the endorsers, the endorsers were liable to the holder.—*Mair v. Crawford*, L. R. 2 H. L. Sc. 456.

See BANKRUPTCY, 1, 9; LIEN.

BROKER.

1. Trover for conversion of thirteen bales of cotton. B. induced the plaintiffs by fraudulent representations to sell him certain cotton. The defendant, a broker, purchased the cotton of B., stating that he would send in the name of his principal in the course of the day. The defendant purchased the cotton in the expectation that a certain customer would want it. The customer accepted the cotton; and the defendant sent B. an order for delivery of the cotton, in which said customer was named as principal. The latter received the cotton, and paid the defendant, who paid B. The judge left it to the jury whether the cotton had been bought by the defendant in the course of his business as broker, and whether he dealt with the goods as agent for his principal. Both questions were answered in the affirmative; and the judge directed a verdict for the defendant. A rule was granted to enter verdict for the plaintiffs, and was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion. This appeal was then brought. *Held*, that the defendant had been guilty of conversion of the cotton, and was liable in trover.—*Hollins v. Fowler*, L. R. 7 H. L. 757; s. c. L. R. 7 Q. B. (Ex. Ch.) 616; 7 Am. Law Rev. 286.

2. The defendant, a merchant in Liverpool, employed the plaintiffs, tallow-brokers in London, to buy fifty tons of tallow for him in

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London. By the custom of the London tallow trade, brokers contract in their own name, and are personally liable for all the tallow they need, and they pass to their principals bought notes for the specific quantity ordered. The plaintiffs bought a hundred and fifty tons of tallow, and sent the defendant a bought note for fifty tons according to said custom. The defendant refused to accept the tallow; and the plaintiffs sold it for less than the price agreed between them and the defendant, and then brought assumpsit to recover the difference. *Held*, that the defendant was not bound by said custom, and that the plaintiffs could not maintain their action.—*Mollett v. Robinson*, L. R. 7 H. L. 802; s. c. 7 C. P. (Kx. Ch.) 84; L. R. 5 C. P. 646; 6 Am. Law Rev. 684; 5 *id.* 473.

See CONTRACT, 3.

BUILDING.—See COVENANT.

CARRIER.

A passenger on a steamer purchased a ticket for his passage from D. to W. The ticket had on its face only the words, "D. to W." On the back of the ticket were the words, "The company incurs no liability in respect of loss, injury, or delay, to the passenger or to his luggage, whether arising from the act, neglect, or default of the company or their servants or otherwise." The passenger did not look at the back of his ticket. His luggage was lost by the fault of the steamer. *Held*, that the steamer company was liable for the loss. See the interesting remarks of the lords on this subject.—*Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470.

CHARITABLE BEQUEST.

A testator bequeathed a certain fund to trustees in trust for a charitable society, the members of which were by its rule to provide by subscription a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. Poverty was not a necessary qualification of a member to entitle him to an allowance. The trustees held the fund for thirty years, when the society was dissolved. *Held*, that said fund went to the testator's residuary legatee, and need not be applied *cy-près* for charitable purposes.—*In re Clark's Trust*, 1 Ch. D. 497.

CHAMPERTY.

Clients covenanted to pay their solicitors ten per cent. of property to be recovered, and that the solicitors should have a lien on all such property for such ten per cent., and that, on demand, a mortgage of such property should be executed. If no property was recovered, no percentage or commission was to be paid. It seems that this agreement was pure champerty.—See *In re Attorneys' and Solicitors' Act*, 1870, 1 Ch. D. 573.

CHURCH OF ENGLAND.

A persistent denial of the existence and personality of the devil, or the denial of the

doctrine of the eternity of punishment, or of all punishment, for sin, in a future state, constitutes the denial "an evil liver," and a depraver of the "Book of Common Prayer and Administration of the Sacraments," within the 27th canon of 1603 of the Church of England.—*Jenkins v. Cook*, L. R. 4 Ad. and Ec. 463.

N. B.—This decision has been overruled by the Privy Council. Report not yet received.

CLASS.—See DEVISE, 4, 8.

CODICIL.—See WILL, 3.

COLLISION.

A steamboat hove to in the fairway of a channel, and, with no one at her starting-gear, in heavy rainy weather, was run into by a sailing vessel. *Held*, that it was the duty of the tug to have kept herself in readiness to move out of the way of sailing vessels, and that she alone was to blame for the collision.—*The Jennie Barker*, L. R. 4 Ad. and Ec. 456.

See LEX FORI; SHIP.

COMMON CARRIER.—See CARRIER.

COMPOSITION.—See BANKRUPTCY.

CONDITION.

1. A testatrix bequeathed her property in trust to pay the income during the joint lives of her adopted daughter and her husband to the husband, and, after the decease of either, to the survivor for life; provided that if the husband should survive his wife, and marry again, then the trustees were to hold the property upon certain other trusts. The husband survived his wife, and married again. *Held*, that the proviso was valid, and that the gift over took effect.—*Allen v. Jackson*, 1 Ch. D. 399; s. c. L. R. 19 Eq. 631; Am. Law Rev.

2. Declaration that the plaintiff, a singer, agreed with the defendant, director of the Royal Italian Opera, to sing as tenor in the theatres, halls, and drawing-rooms, public and private, in Great Britain and Ireland, from March 30 to July 13, 1875, at £150 per month, and to sing in concerts as well as in operas, but not to sing anywhere out of the kingdom from Jan. 1 to Dec. 31, 1875, without the defendant's written permission, except at a distance of fifty miles from the theatre and out of the season of the theatre, and to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals; that the plaintiff was prevented by temporary illness from being in London before March 23, 1875, on which day he did arrive there; and that, save as aforesaid, the plaintiff had performed and was willing to perform his agreement, but that the defendant refused to receive the plaintiff into his service. The defendant in his answer set up said failure to be in London, and alleged that as the reason of his refusal to receive the plaintiff into his

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service. Demurrer. *Held*, that the term of the agreement, requiring the plaintiff to be in London on March 30, was not a condition precedent, as it did not go to the root of the contract, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant stipulated for.—*Bettini v. Gye*, 1 Q. B. D. 183.

CONSOLIDATION.—*See* MORTGAGE, 2.

CONSTRUCTION.—*See* CONDITION, 1; CONTRACT; DEVISE; DWELLING-PLACE; EXECUTORS AND ADMINISTRATORS; FREIGHT; ILLEGITIMATE CHILDREN; LEGACY; SETTLEMENT; WAGER; WILL, 3.

CONTRACT.

1. A building society comprised under its rules investing or "unadvanced" members and borrowing or "advanced" members. The unadvanced members subscribed for shares, and became entitled to interest on their subscription-money. The advanced members were those who subscribed for shares in order to obtain an advance out of the funds of the society. The society was authorized by its rules to make, to the member who offered the highest premium, loans which were secured by mortgage. S. borrowed money of the society at a certain premium, and executed a mortgage, in which he covenanted to pay the society certain sums periodically "at the times and in manner prescribed by its rules for the time being applicable," until (first) the sum borrowed, with interest at four per cent. on the amount thereof, should be paid, and until (secondly) said premium, with interest at said rate, should be paid; and that, in the meantime, all the rules for the time being of the society should, in respect of said borrowed sum, be observed and complied with by S. Subsequently the society, which had in the meantime lost money, passed new rules, which imposed upon members the obligation to contribute towards repayment of said losses, and that, "so far as the rules of law and equity will permit, these rules shall apply to all the members as well present as future." *Held*, that S. was not obliged to make any contribution imposed upon him under said new rules.—*Smith's Case*, 1 Ch. D. 481.

2. The defendant, who carried on business in London, sent an order by letter for certain goods to the plaintiff in Southwark. The plaintiff did not answer the letter, but sent the goods to the defendant in London, where they were accepted. *Held*, that the cause of action arose in London.—*Taylor v. Jones*, 1 C. P. D. 87.

3. The defendant, a broker, signed a sold note in these terms: "Messrs. S. & Co., I have this day sold by your order and for your account, to my principals, about five tons of pressed anthracene, xx." *Held*, that the defendant was personally liable on said sold

note in an action for goods sold and delivered.—*Southwell v. Bouditch*, 1 C. P. D. 100.

See BROKER, 2; CARRIER; CONDITION, 2; DAMAGES; ELECTION, 2; FREIGHT; MASTER AND SERVANT.

CONVERSION.—*See* BROKER, 1; DEVISE, 6.

CONVERSION OF REALTY INTO PERSONALTY.—*See* ELECTION, 1.

CONVICTION.—*See* JUDGE, DISQUALIFICATION OF.

CORPUS.—*See* DEVISE, 5.

COURT.—*See* JUDGE, DISQUALIFICATION OF.

COVENANT.

The defendant purchased a piece of land forming portion of a much larger tract of a mortgagor and mortgagees in possession, and covenanted with the mortgagees, their heirs and assigns, not to erect any building thereon nearer a certain road on which the land fronted than the line frontage of other adjoining houses on said road, and to observe a straight line of frontage with such houses. B. purchased another piece of land next the defendant's lot, and made similar covenants. Subsequently the mortgagees transferred to M. their securities on the remainder of said tract, and conveyed to him the fees of the tract, subject to the equity of redemption. The defendant built two houses on his land, the general line of which was nearer said road than the line of said existing houses by from five inches to a foot. The defendant's houses were, moreover, built with bay-windows, projecting about three feet farther towards the road, and carried from the foundation to the roof. It seems that the defendant had notice given B. and M. not to build as aforesaid. B. and M. filed a bill praying an injunction restraining the defendant from permitting to continue on his premises any building nearer said road than the line of frontage of said existing houses; but they consented not to press so much of the bill as related to the advance of the main line of the building. *Held*, that the plaintiffs were entitled to a mandatory injunction against continuance of the bay-windows. The bay-window was a "building;" the plaintiffs were not obliged to show damage; they each had an interest sufficient to maintain the suit; and having given notice to the defendant, they were entitled to a mandatory injunction.—*Lord Manners v. Johnson*, 1 Ch. D. 678.

See LEASE; SPECIFIC PERFORMANCE.

CRIMINAL PROCEEDINGS.—*See* JUDGE, DISQUALIFICATION OF.

CUSTOM.

A custom was alleged to exist among furniture-dealers to furnish persons, under a "hiring agreement," with furniture which shall remain in their possession while the property remains in the dealer until certain

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specified payments are made, when it passes to the person entering into the agreement. To establish such a custom so that it would prevent the hirer from being the reputed owner of the property, it must be proved to have existed so long, and to have been so extensively acted upon, that the ordinary creditors of the hirer in his trade may be reasonably presumed to have known it. As to what evidence is sufficient for this purpose, see *Ex parte Powell*. In *re Matthews*, 1 Ch. D. 501.

See **BROKER, 2.**

CY-PRES.—See **CHARITABLE GIFT.**

DAMAGES.

The defendant sold a cow to the plaintiff, who was a farmer, with warranty that it was free from foot-and-mouth disease. The cow had the disease, and communicated it to other cows belonging to the plaintiff. The judge instructed the jury, that if they found that the defendant knew that the plaintiff was a farmer, and would in the ordinary course of his business place the cow with other cows, then they might assess damages for the loss of the other cows. The jury found damages covering the loss of all the cows. *Held*, that the above instruction was correct.—*Smith v. Green*, 1 C. P. D. 92.

See **DEFAMATION ; INTEREST.**

DANGER OF THE SEAS.

Bills of lading were signed for due delivery of the cargo at the port of discharge, the dangers of the seas and fire only excepted. During the voyage some of the crew bored holes in the sides of the vessel, through which the water entered, and damaged the cargo. *Held*, that the said barratrous act of the crew did not fall within the exception in the bills of lading.—*The Chasca*, L. R. 4 Ad. and Ec. 446.

DEFAMATION.

The plaintiff brought an action against the defendant for falsely and maliciously imputing adultery to the plaintiff's wife, who assisted the plaintiff in his business, with one A. upon the plaintiff's premises, whereby the plaintiff was injured in his business as a grocer and draper. Evidence was offered that the plaintiff's business had fallen off since the words were spoken; but no evidence was offered that any particular persons had ceased to deal with the plaintiff. *Held*, that the action was maintainable, and that damage was sufficiently shown.—*Riding v. Smith*, 1 Ex. D. 91.

DEMURRAGE.—See **CHARTERPARTY, 1.**

DESCRIPTIO PERSONÆ.—See **GENTLEMAN.**

DEVIL, PERSONALITY OF THE.—See **CHURCH OF ENGLAND.**

DEVISE.

1. A testator, who was mortgagee of certain real estate, and entitled to one moiety of the equity of redemption, devised "all his property real and personal" upon trust, first, to pay all his debts, funeral and testamentary expenses; secondly, upon certain trusts for his wife and children, with power in the trustees to sell or mortgage any part of his estate real or personal. There was no express devise of trust or mortgaged estates. *Held*, that the legal estate in the mortgaged premises did not pass under the will.—*In re Packman & Moss*, 1 Ch. D. 214.

2. Devise to A. for life, and from and after his decease unto his eldest son if he shall have arrived at the age of twenty-one years, or so soon as he shall arrive at that age; and, in default of his having a son, over. A. died, leaving a son, who was a minor. *Held*, that A.'s son took a vested estate in fee, liable to be divested in the event of his death under the age of twenty-one; and that there was an executory devise to A. in tail if A. should die under twenty-one.—*Andrew v. Andrew*, 1 Ch. D. 410.

3. Devise to A. for life, and in the event of his leaving a lawful son born or to be born in due time after his decease, who should live to attain the age of twenty-one years, then to such son and his heirs if he shall live to attain the age of twenty-one years; but in case A. should die without leaving a son who should attain twenty-one, then over. A. died leaving an infant son. *Held*, that A.'s son took a vested estate in fee, subject to be divested in event of his dying under twenty-one.—*Muskett v. Eaton*, 1 Ch. D. 435.

4. A testator gave real and personal estate in trust to convert and invest and pay the interest to his wife so long as she should continue unmarried; and, after her death or marriage, in trust to pay the interest to his son for life, and afterwards to his lawful issue. At the death of the son, there were living three of his children and one grandchild. One of the children, a daughter, married ten days after her father's death, and had a child six months after her marriage. *Held*, that the fund must be divided among the three children and grandchild as joint-tenants. The child subsequently born, although *en ventre sa mère*, and alive at the death of the tenant for life, and legitimate when born, was not legitimate at the time of distribution, and not entitled to share in the fund.—*In re Corliss*, 1 Ch. D. 460.

5. Devise of real and personal estate to a trustee, with directions that he should pay the testator's debts "out of my rents and profits," and divide the remainder of the rents and profits equally between the testator's uncles during their lives, and, after their decease, in trust for their children; if no children, the income to C for life, remainder to his children; if C. died childless, then "I give the whole of my real and personal estate, to H., his heirs and assigns for ever." The personal estate was insufficient to pay the

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debts. *Held*, that the testator's debts were charged upon the corpus of the estate; the uncles desired to sell the real estate; while C. desired to mortgage it, to raise money to pay said debts. The court declared that the wishes of those who came first in order of taking ought first to receive the attention of the court, and ordered the real estate to be sold, giving C. liberty to bid.—*Melcalfe v. Hutchinson*, 1 Ch. D. 691.

6. A testator devised his real and bequeathed his personal estate to trustees in trust to sell and to dispose of the moneys arising therefrom, after payment of debts and certain legacies, according to the trusts "hereinafter declared concerning the same;" and he gave his trustees power to postpone sale of his estate, and to let unsold real estate; but he declared, that, from the time of his decease, his unsold real and personal estate should be subject to the trusts afterward declared concerning said moneys, and that the rents should be deemed annual income, and that the real estate should be transmissible as personal estate, and be considered as converted in equity. The testator then directed his trustees to stand possessed of said moneys upon trust to raise an annuity, subject to which he directed them to stand possessed of his "residuary personal estate" in trust as to one moiety for his son, and as to the other for his daughter. *Held*, that the proceeds of the sale of the real estate were included in the directions in the will as to the ultimate trusts of the residuary personal estate.—*Court v. Buckland*, 1 Ch. D. 605.

7. Upon certain contingencies which took place, a testator devised his real estate to trustees in trust to keep in repair, accumulate surplus rents and profits, and invest in real estate until the expiration of twenty-one years from the testator's death, but in no event to exceed such term, and then in trust for the second and other younger sons of A. successively in tail male; failing such issue, in trust for the first and other sons of B. successively in tail male; failing such issue, limitations over followed to the issue of certain persons; and failing such issue, to the persons who, under the Statute of Distributions, should then be his next of kin. The testator directed his personal property to be held upon the trusts declared of his real estate. At the expiration of the twenty-one years, A. and B. each had one son only. The son of B. filed a bill praying a declaration that he was absolutely entitled as tenant in tail male in possession of the real estate, and was absolutely entitled to the personal estate. *Held*, that, until it should be ascertained whether A. would have a second son, the rents and income of the real and personal estate were undisposed of; and that in the meantime the testator's heirs at law were entitled to the rents, and his next of kin to the income.—*Wade-Gery v. Handley*, 1 Ch. D. 653.

8. A testator gave all his property, by his will, to his niece S. for life, remainder to her husband for life, remainder "to be equally divided among the children of the above-

named" S. and her husband, "either by the proceeds from sale of the properties or otherwise." S. had eight children living at the death of the testator, of whom two were attesting witnesses of the will, and thereby forfeited the shares they would have received under the will. *Held*, that the devise was to a class who would take in undivided shares the whole property devised, and that, therefore, the six children would take said property, and the forfeited shares would not pass to the testator's heir-at-law.—*Fell v. Biddolph*, L. R. 10 C. P. 701.

See CONDITION, 1; ELECTION, 1; EXECUTORS AND ADMINISTRATORS; ILLEGITIMATE CHILDREN; LEGACY; WILL, 3.

DISCOVERY.—See BILL IN EQUITY; DOCUMENTS, INSPECTION OF.

DISTRIBUTION.—See LEGACY, 2.

DOCUMENTS, INSPECTION OF.

1. A suit and cross-suit were instituted between the owners of the vessel B. and the vessel H.; the question being, which of the two vessels was to blame for a collision. The suits were ended by agreement, and an average statement made on the basis of the agreement. Subsequently an action was brought against the owners of the B. by consignees of goods on the B., and a motion made by the plaintiffs for inspection of said agreement and average statement. Inspection ordered. This order was affirmed on appeal, upon an affidavit that said suit in the Admiralty Court was on behalf of the owners of cargo as well as owners of the vessel B.—*Hutchinson v. Glover*, 1 Q. B. D. 138.

2. The defendant purchased wood of the K. Company, and, before he received it, agreed to sell the same wood to the plaintiff. The plaintiff declined to receive the wood sent him, on the ground that it was not according to contract; and he brought an action for breach of contract. The defendant received two letters from the plaintiff's attorneys relating to the claim, and sent them to the K. Company, requesting information respecting the claim. Correspondence by letter ensued, which resulted in the defendant receiving compensation from the K. Company. *Held*, that the plaintiff was entitled to inspection of the letters between the defendant and the K. Company.—*English v. Tottie*, 1 Q. B. D. 141.

DOMICILE.—See PEER OF ENGLAND.

DWELLING-PLACE.

A statute imposed a penalty for exposing certain animals for sale in any place except the seller's "dwelling-place or shop." The appellant offered for sale animals in a certain yard and sheds, the entrance to which from the street was through double-doors. After passing through the doors, there was a place about thirty feet by twenty, covered in by beams and flooring. The appellant lived in a small house supported by pillars on either

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side of this place, the floor of his house forming the ceiling of this under-space. The yard then extended farther without a ceiling to the length of about a hundred and fifty-eight feet from the street-doors, and this part was fitted with said sheds for the accommodation of cattle. In order to enter the yard and sheds, the appellant descended stairs from his dwelling-house into the covered space, and then passed into the open yard and sheds. *Held*, that said yard and sheds were not the dwelling-place or shop of the appellant.—*McHole v. Davies*, 1 Q. B. D. 59.

EASEMENT.—See **WAY**.

EJECTMENT.

A breach of a covenant to repair was committed by a lessee after an assignment of the reversion. *Held*, that the assignee could maintain ejectment, although he had given the lessee no notice of the assignment.—*Scallock v. Harston*, 1 C. P. D. 106.

ELECTION.

1. A testator devised a house to A., B. and C., in trust to sell and convert it into money, the purchase-money to be considered part of the testator's personal estate. He then gave certain legacies, and bequeathed the remainder of his estate, real and personal, to A., B. and C. Said devisees left two legacies unpaid, and did not sell the house, but remained in possession of it for fifty years. C. died, and her representative filed a bill for administration of the personal estate and execution of the trusts of said testator's will. The object of the bill was to obtain possession of C.'s share in the house, on the ground that it was, in equity, personal estate. *Held*, that A., B. and C. had elected to hold the house as real estate. The fact that said legacies were unpaid made no difference, as the legatees had no direct charge on the house other than that on the whole of the testator's estate, and therefore had no interest as to whether A., B. and C. took the house as real or personal estate, and must be held to have acquiesced in the house being held as real estate.—*Mutton v. Bigg*, 1 Ch. D. 385.

2. By indenture made in 1850 between a husband and wife of the first part, the wife's father of the second part, and four trustees of the third part, reciting that upon the treaty for the marriage it was agreed that certain stock belonging to the husband, and a reversionary interest belonging to the wife, should be settled upon the trusts thereafter mentioned, and that the wife's father had agreed to transfer certain shares to said trustees to be settled upon the trusts thereafter mentioned, it was declared that said trustees should pay the income of the husband's stocks to him for life, and after his decease to his wife for life; and should pay during the joint lives of said husband and wife one moiety of the income of said shares to the husband, and the other moiety to the wife for her separate use; and, after the decease of either, should pay the whole income to the survivor for life,

and, after the decease of the survivor, should hold all of the above funds upon trusts for the children of the marriage. And it was lastly witnessed, that, in pursuance of said agreement, the wife, with the privity of her husband, assigned her said reversionary interest to said trustees to hold upon the same trusts as said shares. In 1865 the marriage was dissolved. In 1871 the said reversionary interest came into possession. *Held*, that the wife must elect between the benefits under the settlement and her right to said reversion. Another order was made directing how the accounts under the election should be taken.—*Codrington v. Codrington*, L. R. 7 H. L. 854; 8 C. C. M. *Codrington v. Lindsay*, L. R. 8 Ch. 578; 8 Am. Law Rev. 293.

ENTAIL.—See **SETTLEMENT**, 4.

EQUITABLE ASSIGNMENT.—See **BANKRUPTCY**, 7.

EQUITY.—See **BILL IN EQUITY**; **COVENANT**; **LEASE**, 1, 2; **SPECIFIC PERFORMANCE**.

ESTATE TAIL.—See **DEVISE**, 2.

EVIDENCE.

In 1874 the question arose as to whether A. and B. had been married in 1773. In 1800 a son wrote to his maternal uncle, "What I want to do is to establish my legitimacy," &c. The uncle was then in possession of an estate which had been devised to B. for life, with remainder to her children lawfully begotten, and, in default of such issue, to said uncle. The uncle also wrote to a brother of A., stating that he could not give up the estate in question, as it was entailed on his children. If said son was illegitimate, said brother of A. would have taken a title which would otherwise have belonged to the son. *Held*, that declarations of members of the two families of A. and B., made after 1800 and bearing on the question of the marriage, were inadmissible.—*Frederick v. Attorney-General*, L. R. 3 P. and D. 270.

See **DEFAMATION**; **FOREIGN LAW**; **GAMING**; **ILLEGITIMATE CHILDREN**.

EXECUTORS AND ADMINISTRATORS.

1. A testator devised his property to trustees, directing them to convert it into money, and pay his debts and funeral expenses therefrom, and pay the balance over to certain other trustees. He also directed that each executor should only be accountable for his own intromissions. *Held*, that said trustees were the executors of the will according to its tenor.—*In the Goods of Adamson*, L. R. 3 P. and D. 253.

2. A testator made the following provisions in his will: "I appoint G., if he shall survive me, executor and trustee. I give the following legacies and annuities: namely, to G. and B. the sum of £1,000 apiece; to my great-nephew, £2,000; to my wife, £100; to my son and my daughter, £100 apiece." He then gave different legacies and annuities to

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his wife, son, daughter, and sister. He then gave all his real estate and the residue of his personal estate to "the said G. for all my estate and interest therein respectively, if he shall be alive at my decease; but if he shall die in my lifetime, then I give my said real estate and residuary personal estate unto the said B. for all my estate and interest therein respectively." He empowered his trustee to invest his personal estate, and to continue subsisting investments without liability for loss, and to employ accountants and receivers; and he appointed him guardian of his children. G. survived the testator. *Held* (Lord CHELMSFORD dissenting), that G. was entitled to the real and residuary personal estate beneficially, and not subject to trusts.—*Williams v. Arkle*, L. R. 7 H. L. 606.

See ADMINISTRATION SUIT; INSURANCE,
3; MARSHALLING ASSETS; MORTGAGE, 3.

EXECUTORY DEVISE.—See DEVISE, 2.

FOREIGN LAW.

Where evidence was required in England to show the powers and position in Italy of a curator of the dormant inheritance of a testator, it was *held* that the affidavit of a person in England, who described himself as a certified special pleader and as familiar with the Italian law, was insufficient.—*In the Goods of Bonelli*, 1 P. D. 69.

See LEX FORI.

FORFEITURE.—See DIVORCE, 1.

FRAUD.—See BANKRUPTCY, 1, 10; VOLUNTARY SETTLEMENT.

FRAUDS, STATUTE OF.—See WILL, 4.

FREIGHT.

By charterparty, freight was payable upon coal delivered at the port of destination. The vessel carrying the coal met with bad weather, and put in at an intermediate port, where the master was obliged to sell part of the coal to defray the expense of repairs. An average statement was made up, under which the shipper received the net proceeds of the coal sold, but the ship-owner was not allowed freight on such coal. The coal sold as aforesaid brought a much higher price than it would have brought if sold at the port of destination. *Held*, that the ship-owner was not entitled to *pro rata* freight.—*Hopper v. Burness*, 1 C. P. D. 137.

FURNITURE LEASE.—See CUSTOM.

GAMING.

Information against a landlady for "suffering" gambling to be carried on on her premises. It appeared in evidence that three persons were occupying a private room, and that, at about eleven o'clock in the evening, the landlady went into the room and asked if any refreshments were required before closing. No card-playing was then going on,

and the landlady saw no cards. The landlady then told the hall porter that she was going to bed; and she closed the bar, and retired. The hall porter then closed the house and retired to his own chair in a parlor at the extreme end of the house. He knew of no gambling going on in the said private room. The above three persons were discovered playing cards between one and two o'clock in the morning by the police. On these facts the landlady was convicted. *Held*, that the landlady was responsible if the hall porter, whom she left in charge of the house, connived at the gaming; and that it might be inferred from the evidence that the hall porter purposely kept out of the way, and so connived at the gaming. Conviction sustained.—*Redgate v. Haynes*, 1 Q. B. D. 89.

GENTLEMAN.

A man who had, on a few occasions, collected debts and written letters for other persons, and had on four occasions drawn bills of sale, but had no regular occupation, and subsisted on an allowance from his mother, was *held* to be properly described as "gentleman."—*Smith v. Cheese*, 1 C. P. D. 60.

HOTCHPOT.—See APPOINTMENT.

HUSBAND AND WIFE.—See BANKRUPTCY, 4.

ILLEGITIMATE CHILDREN.

1. A testator gave a fund to trustees in trust to pay the income to "my daughter A., wife of J. H., for her separate use for life," and to divide the principal between "all the children of my daughter A., as and when they shall respectively attain the ages of twenty-one years in equal shares." For some time previously to the testator's death, and at the dates of the will and his death, J. H. and the daughter A. were living together as man and wife at B., where the testator resided; but they were not married until five years after the testator's death. One child of A. was born before the testator's will, two after his will, but before the marriage, and one after the marriage. They were all baptized, and described as the children of A. and J. H. A. died. *Held*, that the legitimate child was entitled to the whole fund.—*In re Ayles' Trusts*, 1 Ch. D. 282.

2. Request in trust for "all and every my daughters, in equal shares, who shall attain the age of twenty-one years or marry." The testator died, leaving his wife and three daughters, all minors, by her, but born before his marriage; and he had always acknowledged the daughters as his children. He left no legitimate children. *Held*, that, as the testator left no daughters in the legal sense, parol evidence of the surrounding circumstances was admissible, and that said three children were entitled to the bequest.—*Laker v. Hordern*, 1 Ch. D. 644.

See DEVISE, 4.

INDORSER.—See BILLS AND NOTES.

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INJUNCTION.—*See COVENANT.*

INSPECTION OF DOCUMENTS.—*See DOCUMENTS, INSPECTION OF.*

INSURANCE.

1. The plaintiff insured "goods" for a voyage, and effected reinsurance on the same terms without stating that he was reinsuring. It was proved to be the invariable practice to disclose the fact that a policy was for reinsurance; but the jury found that there was no concealment of any fact material to the risk. *Held*, that the plaintiff was entitled to recover upon his policy of reinsurance.—*Mackenzie v. Whitworth*, 1 Ex. D. 36; s. c. L. R. 10 Ex. 142; 10 Am. Law Rev. 116.

2. A vessel was insured on a voyage from Liverpool to Baltimore and United Kingdom. The insurers reinsured on the same terms; but, subsequently hearing that the vessel had sailed from Baltimore for Antwerp, they obtained from the reinsurers, on Jan. 2, 1873, for an additional premium, an indorsement on the policy of reinsurance, "It is hereby agreed to allow the vessel to go to Antwerp." Both insurers and reinsurers believed the vessel to be then at sea; but she had, in fact, arrived at Antwerp on Jan. 1, 1873. On Jan. 3, while the vessel was in the outer dock, and before her arrival at the inner dock, the usual place of discharge at Antwerp, she was ordered to and sailed for Leith, and, on the voyage thither, was lost. *Held*, that, under the policy and memorandum, the vessel had no right to go first to Antwerp, and thence to the United Kingdom; and that the insurers were not entitled to recover the additional premium, as, when the memorandum was made, the voyage was not at an end.—*Stone v. Marine Insurance Company, Ocean Limited, of Gothenburg*, 1 Ex. D. 81.

3. C. effected insurance on the life of his son, in which he had no insurable interest. The son died, and C. was appointed administrator, and the insurance-money was paid to him. *Held*, that, although the insurance company was not obliged to pay the money, C. was entitled to retain it as against his son's estate.—*Worthington v. Curtis*, 1 Ch. D. 419.

4. The plaintiffs insured against perils of the sea a vessel then in London, upon a time policy, and she was lost at sea before the expiration of the policy. The jury could not agree whether the ship was unseaworthy when she left London, or whether unseaworthiness was the cause of her loss; but they found, that, if unseaworthy when she started from London, the plaintiffs did not know of it. A verdict was directed for plaintiffs, and a rule for a new trial discharged by the Queen's Bench. *Held* (by CLEASBY and POLLOCK, BB., COLERIDGE, C. J., and GROVE, J.,—BRETT, J., and AMPHLETT, B., dissenting), that there must be a new trial.—*Dudgeon v. Pembroke*, 1 Q. B. D. 96; s. c. L. R. 9 Q. B. 581; 9 Am. Law Rev. 479.

INTEREST.

By statute, the owners of a ship are not to

be liable in respect of loss of merchandise to an aggregate amount exceeding £8 for each ton of the ship's tonnage. A vessel lost a cargo of maize owing to a collision, and damages were found to the extent of £8 per ton. Interest was allowed on this amount from the date of the collision.—*Smith v. Kirby*, 1 Q. B. D. 131.

JOINT-TENANCY.—*See DEVISE, 8.*

JUDGE, DISQUALIFICATION OF.

A local board of health entered into an agreement with H. for his receiving sewage on to his farm, and subsequently instituted proceedings against him for breach of agreement. A summons was taken out against H. for diverting the sewage from his farm into a watercourse. At the hearing of this case one M., a member of said local board, sat as one of four justices, and H. was convicted and fined. M. filed an affidavit that he exercised no influence on the proceedings at the hearing, except to recommend a mitigation of fine after the other three justices had resolved to convict. *Held*, that M. was subject to a bias, and ought not to have sat in the case. Conviction quashed on *certiorari*.—*Queen v. Meyer*, 1. Q. B. D. 173.

JURISDICTION.—*See CONTRACT, 2.*

LANDLORD AND TENANT.—*See EJECTMENT.*

LAPSE.—*See APPOINTMENT.*

LEASE.

1. A lessee covenanted to make certain repairs upon six months' notice. Notice was duly given Oct. 22, 1874; and the lessee's sub-lessees replied, asking if the lessor would purchase the short leasehold interest remaining. The lessor replied, asking the price; and the sub-lessees answered, stating their price. On Dec. 31, 1874, the lessor replied, that, having regard to the condition of the leased premises, the price was too high; and he asked a reconsideration of the question of price, and stated that he should be glad to receive a modified proposal. In January, 1875, the lessor wrote to the sub-lessees, asking for the ground-rent, and requesting the address of the lessee. On Jan. 7 the sub-lessees replied, sending the lessor's address. On April 13, 1875, the lessor wrote to the lessee, informing him that the time for completion of said repairs would expire April 21, 1875. The repairs were completed about the middle of June, 1875. The lessor began an action of ejectment against the sub-lessees on April 28, 1875. *Held* (reversing the decision of the Common Pleas Division,) that the negotiations were not ended by the letter of Dec. 31, 1874, and that the lessor had justified the sub-lessees' belief that the notice would not be insisted upon, and that the lessor would be restrained from enforcing a forfeiture.—*Hughes v. Metropolitan Railway Co.*, 1 C. P. D. 120.

2. Declaration that by lease M. "let" to

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the defendant certain coal-mines and seams of coal upon certain lands, and that M. had no title, and that he knew, and the defendant did not know, that he had no title to a large portion of the devised premises. There was no express allegation of fraud. Demurrer. *Held*, that the word "let" implied a covenant that the lessor had a good title, and that the lessee should have quiet enjoyment; and that the lessee might elect to keep the part of the leased premises to which he had a good title, and sue for damages for breach of said implied covenants. Also that, upon the alleged facts, a court of equity would have set aside the lease. See Judicature Act, 1873 (36 and 37 Vict. c. 66), ss. 24, 34.—*Mostyn v. West Mostyn Coal and Iron Co.*, 1 C. P. D. 145.

See SPECIFIC PERFORMANCE.

(To be continued.)

REVIEWS.

FORMS AND PRECEDENTS OF PLEADINGS AND PROCEEDINGS IN THE COURT OF CHANCERY FOR ONTARIO. By Wm. Leggo, of Osgoode Hall, Barrister-at-Law, late Master at Hamilton. Second Edition. Toronto: R. Carswell, 1876.

No book that has been published for some years in Canada could be more useful to the every-day Chancery practitioner than this new edition of Leggo's Chancery Forms.

The first edition of the Forms had become obsolete to such an extent as to make it a very unreliable guide. The new edition has been long promised, and, having carefully examined it, we can fairly say that it fulfils our expectations.

Judging from internal evidence, and also from our knowledge of the labour bestowed upon the work by Mr. Holmsted, we think that gentleman is entitled to more credit than the rather meagre reference to him in the final clause of the preface. If the book is a success, and that may be assured, its success will be largely due to the present Registrar of the Court of Chancery, and this is especially true of Chapters VII. and XVIII.

Mr. Leggo was known for some years as an excellent Master, and his experience

in that position well qualifies him to speak with authority upon proceedings in the Master's Office. See Chapter XV.

Since the publication of Ewart's Manual of Costs, some alterations have been made in the tariff of fees under general order. The revised tariff in full and the Supreme Court tariff are published in Chapter XVII.

We might call attention to one error which has caught our eye in glancing over this work. In Form 396 the words "Clerk of Records and Writs," in the seventh line, should be omitted.

The publication of the last orders transferring the duties of the Accountant to the Referee in Chambers will necessitate a few changes in the wording of the forms, which will, however, easily suggest themselves to practitioners.

The work is well got up, neatly printed, and inexpensive, and in these respects it forms a striking contrast to the two volumes of Leggo's Chancery Practice. The arrangement of the forms is admirable, following the ordinary course of procedure in suits, and necessitating fewer references to the index than were necessary in using the old work. We can confidently recommend this new edition of Chancery Forms to the profession.

SHOWERS' CASES IN PARLIAMENT, RESOLVED AND ADJUDGED UPON; PETITIONS AND WRITS OF ERROR; Fourth Edition, Containing Additional Cases not Hitherto Reported, Revised and Edited by Richard Loveland Loveland, of the Inner Temple, Barrister-at-Law, Editor of "Kelyng's Crown Cases," and "Hall's Essay on the Rights of the Crown on the Seashore." London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, 1876.

The third edition of Sir Bartholomew Showers' Cases in Parliament was printed in the Savoy, by E. & R. Nutt and R. Gosling (assigns of Edward Sayer, Esq.)

REVIEWS—CORRESPONDENCE.

for Henry Lentot, MDCCXL. (1740), quarto. It has long been out of print, and is very scarce.

Messrs. Stevens & Haynes, the successful publishers of the Reprints of Bellewe, Cooke, Cunningham, Brookes, New Cases, Cleozse Cases in Chancery, William Kelyng and Kelyng's Crown Cases, determined to issue a new or fourth edition of Showers' Cases in Parliament.

The volume, although beautifully printed on old-fashioned paper, in old-fashioned type, instead of being in the quarto, is in the more convenient octavo form, and contains several additional cases not to be found in any of the previous editions of the work.

The last reported case in the edition of 1740 is "*Dominus Rex versus Episcap, Cester, and Richard Pierce, Esq.*" In the edition of 1876 there are the following cases in addition, decided between the years 1726 and 1733, not hitherto reported in any series of the House of Lords :

1. Joseph Oshlen, Esq., appellant, Jonathan Smith, Esq., and others, the co-partners of the joint stock in question, and Peter Delamotte, their secretary, respondents. (This case is cited as MS. in 2 Eq. Ab. Cases, 532.)

2. Mary Thurston, widow, and executrix of Joseph Thurston, Esq., deceased, who was the eldest son and heir of Joseph Thurston, the elder, deceased, and also brother and sole executor of Thomas Thurston, the younger son of the said Joseph Thurston, appellant; John Essingue, Esq., and Mary, his wife, who was the daughter and executrix of Mary Thurston, widow, and executrix of the said Joseph Thurston the elder, respondents.

3. John Morse, gent., Samuel Clark, Esq., and Thomas Bowdler, Esq., on behalf of themselves and others, the proprietors and adventurers of the late Old East India Company, at the time of the dissolution thereof, appellants; Charles

Dubow, Esq., Arthur Moore, Esq., Edward Gibbons, Esq., and Crantham Andrews, Esq., executors of Sir Jonathan Andrews, respondents. (This case is cited as MS. in 2 Eq. Ab. Cases, 279, and 7 Vict., ch. 400, pl. 28.)

4. Sarah Eare, widow, appellant; William Parnell, respondent.

5. Sir Robert Austen, Bart., and Peter Burrell, Esq., executors and trustees of Sir Samuel Lennard, deceased, and Thomas Lennard, infants' appellants; Sir John Leigh, Bart., respondent.

These are all cases of importance, worthy of being ushered into the light of the world by enterprising publishers.

Showers' Cases are models for reporters, even in our day. The statements of the case, the arguments of counsel, and the opinions of the Judges, are all clearly and ably given.

This new edition with an old face of these valuable reports, under the able editorship of R. L. Loveland, Esq., should, in the language of the advertisement, "be welcomed by the profession, as well as enable the custodians of public libraries to complete or add to their series of English Law Reports."

CORRESPONDENCE.

Citation of United States Reports.

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—It has caused a good deal of surprise in the profession that the last number of the Queen's Bench Reports should be flooded with citations of, and extracts from, American cases. These cases are of no authority in this Province, and will never be, so long as the Law of England is to be our guide.

Lord Campbell and other eminent Judges in England, although appreciating the legal acumen of many of the Judges in the States, discountenanced any attempt on the part of counsel to cite Ameri-

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can authorities—excepting those, however, on the subject of International, and in some few instances, Commercial, Law.

The practice has also been disapproved by the Judges of this Province. The late eminent and lamented Chief Justice Robinson, in the judgment of the *Bank of Montreal v. Delatre*, 5 U. C. Q. B., did not acknowledge or recognize the American cases as authorities, but only thought it might be useful to refer to them—on the subject of Mercantile Agency—as they would embody the *English* decisions, and one might expect to find *such* authorities cited as far as any existed.

I do not know if the powers of the Editor-in-Chief are as extensive as those of the editor of the *English Reports*. If they are, I would respectfully suggest that the names, &c., of any American cases referred to in judgments should alone be stated.

Yours, &c.

OCTOGENARIAN.

*References in matters of Account.—
Practice.*

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—The Act 39 Vict. cap. 28, sec. 2, Ont., defining the procedure on a reference of matters of account thereunder, provides that after the making of the report or certificate, the depositions of the witnesses examined together with the exhibits referred to therein, and the award or certificate shall be filed with the officer of the Court with whom the *proceipe* for the said writ was filed; this *prima facie* applying as well in cases where the writ issued in York as in outer counties.

In the latter the *proceipe* and subsequent pleadings being filed in one office, there can be no difficulty; but in the County of York, owing to the existence of a separate office for the issuing of writs, and an omission in the Act to provide for

the practice therein, we are not so fortunate.

Read alone and literally, the section referred to would indicate that in this County an award is to be filed with the Clerk of the Process; as *the person with whom the proceipe was filed*; and this view is taken, we learn, by Mr. Jackson, who urges that although *proceipes* are sent him daily by that official, yet they are never filed with or by him, being merely docketed to conform to a practice which has obtained for years. In the Queen's Bench, on the other hand, the practice has been followed (and in this I think the statute has been intelligently construed) of filing in that Court.

In my view the intention, at all events, of the Legislature is explained by the section following, which, providing that for the purposes of appeal on proper notice given to a Deputy the filings shall be transmitted to the "proper principal office at Toronto, addressed to the Clerk thereof," clearly indicates that in all cases the proper Crown Office shall be considered the headquarters for all filings under this Act.

Yours, etc.,

ATTORNEY.

TO CORRESPONDENTS.

In answer to two questions which have been addressed to us by "Another Second Year," with reference to the subjects for First Intermediate Examinations, we would say that our own opinion (which has been confirmed by one of the examiners) is, that students presenting themselves for the examination in question are not liable to be examined on Acts amending Consol. Stat. cap. 12. As to the second question, we do not think that our correspondent need be under any fear of having to make himself "conversant with the whole Statute Law of Ontario" in order to pass the First Intermediate Examination. However desirable it may be for all law students to make themselves as soon as possible familiar with the points in which the law laid down in English textbooks is altered by our statutes, we are quite certain that for the purposes of this examination it is sufficient for the candidates to be thoroughly acquainted with the particular books and statutes prescribed therefor. It is only at the final examinations for call and certificates of fitness that the whole Statute Law of this Province is prescribed as a subject for examination.

LAW SOCIETY, EASTER TERM.



LAW SOCIETY OF UPPER CANADA.

OSGOODE HALL, EASTER TERM, 39TH VICTORIA.

DURING this Term, the following gentlemen were called to the Bar namely:

DANIEL EDMUND THOMSON.
ROBERT PEARSON.
HENRY J. SCOTT.
R. MARTIN MEREDITH.
J. BOND CLARKE.
ALBERT MONKMAN.
JAMES LEITCH.
CHARLES J. HOLMAN.
JOHN FISHER WOOD.
THOMAS COOKE JOHNSTONE.
HUGH O'LEARY.
EDMUND JOHN REYNOLDS.
PHILIP HOLT.
MICHAEL KEW.
WILLIAM HALL KINGSTON.
ALEXANDER HAGGART.
WILLIAM MYDDELTON HALL.
J. PLINY WHITNEY.
THEOPHILUS H. BESUE.
EDWARD KENRICK.
THOMAS STREET PLUMB.

And the following gentlemen received Certificates of Fitness, namely:

HENRY JAMES SCOTT.
THOMAS HODGKIN.
DANIEL EDMUND THOMSON.
GEORGE W. WELLS.
EDMUND JOHN REYNOLDS.
WILLIAM HENRY ROSS.
WILLIAM CLARK PERKINS.
GEORGE ROSS.
GEORGE S. GOODWILLIE.
JOHN FISHER WOOD.
CHARLES JOSEPH HOLMAN.
ALEXANDER HAGGART.
EUGENE McMAHON.
PHILIP HOLT.
CHARLES H— MCCONKERY.
JOHN WALLACE NESBITT.
JOSEPH BURGIN.
WILLIAM COWAN MOSCIP.
ELIAS TALBOT MALONE.
JAMES PLINY WHITNEY.
GEORGE HOWES GALBRAITH.
THOMAS MERCER MORTON.
SILAS CORBETT LOCKE.

And the following gentlemen were admitted into the Society as Students of the Law:

Graduates.

MURDOCH MUNRO.
WILLIAM JOHN FERGUSON.
CHARLES WESLEY COLTER.

Junior Class.

HENRY WALTER HALL.
CHARLES EDWARD IRVINE.
JOHN O'MEARA.
CHARLES WRIGHT.
FREDERICK WEIR HARCOURT.
DANIEL MCLEAN.
JAMES SCOTT.
FRANK JEFFREY HOWELL.
WILLIAM CHALMERS.
ANGUS MCCRIMMON.
FREDERICK HERBERT THOMPSON.
RUFUS SHOREY NEWELL.
ALBERT BERSFORD WOOD.
JOHN BIRKIN.
WALLACE LESLIE PALMER.
FRANK ANDREW HILTON.
FREDERICK W. HANPER.
STEWART CAMPBELL JOHNSTON.
CHARLES HERBERT ALLEN.
HEDLEY VICARS KNIGHT.
HENRY HOBART FULLER.
ROBERT EDSON BUSH.
WILLIAM DAVID SMITH.
WILLIAM FORSYTH MCCREARY.
FRANCIS EDWARD GALBRAITH.
LAWRENCE JOHN MUNRO.
JAMES LELAND DARLING.
ROBERT ABERCROMBIE PRINGLE.
ARTHUR WILLIAM GUNDEY.
S. G. MCKAY.
DELOS CHARLES McDONALL.
DANIEL R. CUNNINGHAM.
KENAS DONALD MCKAY.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subject namely, (Latin) Horace, Odes, Book 3; Virgil, *Æneid*, Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition

LAW SOCIETY, EASTER TERM.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—*Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History of England (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.*

That the subjects and books for the first Intermediate Examination shall be:—*Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.*

That the subjects and books for the second Intermediate Examination be as follows:—*Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 28, Administration of Justice Acts 1873 and 1874.*

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—*Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.*

2. For Call with Honours, in addition to the preceding—*Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.*

That the subjects for the final examination of Articled Clerks shall be as follows:—*Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.*

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—*Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.*

2nd year.—*Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.*

3rd year.—*Real Property Statutes relating to Ontario—Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.*

4th year.—*Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.*

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLIARD CAMERON,

Treasurer.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

TO THE BENCHES ON THE LAW SOCIETY:

The Committee on Legal Education beg leave to submit the following report:

Your Committee have had under consideration the representations made from time to time to the Benchers, and referred to your Committee, respecting the different courses of study prescribed for Matriculation in the Universities, and for Primary Examination in the Law Society, and now recommend:—

1. That after Hilary Term, 1877, candidates for admission as Students-at-Law, (except Graduates of Universities) be required to pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicerone, for the Manilian Law; Ovid, Fasti, B. I., vv. 1, 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Canto v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian war, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II. OF GERMAN.

A paper on Grammar. Murnaux; Stumme Liebe Schiller, Lied Von der Glocke.

2. That after Hilary Term, 1877, candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), be required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or Virgil, Æneid, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II. and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

3. That a Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

4. That all examinations of Students-at-Law or Articled Clerks be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGKINS, *Chairman.*

OSGOOD HALL, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

J. HILLIARD CAMERON,

Treasurer.

DIARY—CONTENTS—EDITORIAL ITEMS.

DIARY FOR NOVEMBER.

1. Wed... All Saints. Judicature Act came into force in England, 1875.
4. Sat ... Cand. for Atty. to leave papers with Secy. Law Society.
5. SUN... 21st Sunday after Trinity.
7. Tues... Primary Examination.
9. Thur... Prince of Wales born, 1841.
11. Sat... Battle of Chrysler's Farm, 1813.
12. SUN... 22nd Sunday after Trinity.
14. Tues... Intermediate Examination.
16. Thur... Examination for admission. Cand. for call to pay fees.
17. Fri... Examinations for call.
19. SUN... 23rd Sunday after Trinity.
20. Mon... Michaelmas term begins.
21. Tues... Princess Royal born, 1840.
24. Fri... Paper Day, Q.B.
25. Sat... Paper Day, C.P.
26. SUN... 24th Sunday after Trinity.
27. Mon... Paper Day, Q.B.
28. Tues... Paper Day, C.P.
29. Wed... Last day for setting down rehearing in Chan.
30. Thur... St. Andrew's Day.

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THE Canada Law Journal.

Toronto, November, 1876.

THE removal of the portraits from the walls of Osgoode Hall to allow the cleansing and renewal of the building reminds us that the series of portraits is still incomplete, in that there are none of some of our first chief justices, Osgoode, Powell, Scott, and Campbell. We understand that the material is yet in existence to supply the deficiency. Probably it may not be very perfect, but it would be well for the Benchers to appoint a committee to collect information on the subject and report.

WE call attention to the letter of a valued correspondent, to be found in another place, in reference to some amendments of the law, suggested by another correspondent in a recent issue. A full discussion of practical matters like this by men of experience in the profession cannot but be of much assistance to those who are charged with the subject of legal reforms, though it is not likely to benefit those who, though they have a craze for legislative tinkering in that line, are profoundly ignorant of "the old law, the mischief and the remedy."

POETICAL precedents do not go for much in the Court of Chancery. A case was before the Master of the Rolls a few months ago by way of appeal from the Registrar of Trade Marks, who had refused registration as a "distinctive device" of a word composed of the letters "EILYTON." Chitty, Q.C., argued that this word came within the meaning of the statute, and urged that the word "excelsior" upon a banner is called by the poet a strange device. But Sir George Jessel thought that a mere word could

EDITORIAL ITEMS—CERTAINTY IN THE LAW.

not be registered as a trade mark under the Trade Marks Registration Act.—*Re Stephens*, 24 W. R. 963.

SOME misapprehension seems to exist as to the effect of the statute of 1875-6, altering the practice as to payment of money into court. Upon an application made to Mr. Dalton, in a case of *Steinhoff v. Royal Canadian Insurance Company*, for an order for the payment out of court of money paid in under a plea of payment into court, the pleadings having been filed in an outer county, the order was refused. Mr. Dalton, held, that the statute only applied to cases where the pleadings were filed in Toronto, and the money paid to the master there; and that the words "at Toronto" are not part of the description of the court, but are intended to restrain the operation of the statute as above. The practice therefore is not altered as regards the outer counties.

THE death of Mr. Justice Quain, one of the Justices of the Queen's Bench Division, in England, on the 12th September, is thus alluded to in the *Law Journal*: "The profession will sincerely regret the early death of Mr. Justice Quain. It was known that his health had been for some time bad, and that lately his condition had caused anxiety; but the fatal termination is a painful surprise. The late learned judge, after practising as a special pleader without the bar, was called in 1851, and joined the Northern Circuit. His progress was continuous, though not rapid. He took silk in 1860; and the following year he became Attorney-General for the County Palatine of Durham, in succession to Mr. Hindmarsh. Although only four years on the bench, Sir John Quain fully realised the expectations of his friends. His demeanour was at all times kind and courteous,

and his zeal was not less conspicuous than his urbanity. Day after day he became more valuable as a judge, and his death is a great loss to the public service." Later papers announce the death of Mr. Justice Archibald, of the Common Pleas, on the 18th Oct., last. Mr. Archibald was a native of Nova Scotia, and was educated there. He is said to have been a distinguished ornament of the Bench. Mr. Manisty, Q. C. takes the seat vacated by Mr. Justice Quain.

CERTAINTY IN THE LAW.

Upon no subject have many authors and many lawyers been more sarcastic than upon the adherence to precedent which is one of the characteristics of the English law. Tennyson in his "Aylmer's Field" heaps contempt upon "the lawless science of our law,

"That codeless myriad of precedent,
"That wilderness of single instances."

Lawrence Sterne also writes that "Precedents are the bane and disgrace of legislation. They are not wanted to justify right measures, and are absolutely insufficient to excuse wrong ones. They can only be useful to heralds, dancing masters, and gentlemen ushers, because in these departments neither reason, virtue, nor the *salus populi* or *suprema lex* can have any operation." In much the same spirit did good old Serjeant Hill make reply to the judge who hesitated in ruling a point and asked his learned brother for a precedent: "When judges are about to do an unjust or absurd action," Hill said, "they seek for a precedent in order to justify their own conduct by the faults of others."

But it is evident that so long as the law is uncoded, the only practicable plan of giving to it that stability and uniformity

CERTAINTY IN THE LAW.

which is involved in the very conception of the term "law," is by a strict adherence to judicial precedent. "It is the function of a judge," says Coke, "not to make, but to declare the law according to the golden metewand of the law, and not by the crooked cord of discretion." When a case is decided, a rule is thereby laid down by which subsequent transactions are regulated, and by means of which counsel are enabled to advise upon the rights of their clients in a similar conjunction of circumstances. Lord Maccestfield was wont to say that disregarding settled authority was a removing of landmarks, and that it was often of little consequence how a point was determined at first, so it be but adhered to. And Lord Kenyon often repeated the maxim "*Misera est servitas, ubi jus est vagum aut incertum.*"

Nevertheless, while these things are well recognized, there are many causes conspiring to give uncertainty to the administration of the law at present in Ontario. This arises in part from the fluctuations of opinion among the English judges and in the English courts, which of course have a reflex influence on us. Such diversity of work has been cast on the judges, and so many new courts have been constituted, that a general unsettlement of decisions seems to have resulted. Even in minor matters this is apparent. For instance, we find a standing feud between the Master of the Rolls and the Vice-Chancellor Malins as to the power of the court to grant an administration of the estate of a person deceased in the absence of a duly appointed personal representative. In *Rowse v. Morris*, L. R. 17 Eq. 20, Sir George Jessel held in the negative, and in a series of cases prior and subsequent to *Rowse v. Morris*, the Vice-Chancellor stoutly holds to the affirmative view. Again in *Claydon v. Green*, L. R. 3 C. P. 511, it was laid down that the marginal note to a section of a statute in the copy printed by the

Queen's Printer, forms no part of the statute itself, and is not binding as an explanation or construction of the section. But in *Re Venour*, 24 W. R. 752, the Master of the Rolls held that such a marginal note is an integral part of the statute, and his construction of the Act was thereby influenced.

Again: the excessive citation of American decisions, which are not authorities, has swayed the conclusions of the Court in some cases in a manner not in harmony with the weight of English decisions, which are authorities. We remember the time when the Court of Queen's Bench under the presidency of Chief Justice Draper, actually declined to make a note of any American cases cited. This was going too far in one direction. But, as a rule, we think it would be well if the pertinency of these cases were limited to points where there is an entire absence of English or Canadian authority, and to matters arising under statutes which have been adopted by the Legislature from United States sources: such, for instance, as the laws relating to Mechanic's Lien, to Patents for Inventions, and to Mutual Insurance Companies.

Again: the multiplication, repeal and amendment of statute law has given rise to much uncertainty. The convenient plan of passing an Act one session, and then passing another on the same subject, but with sundry modifications, the next session, with a clause tagged on at the end repealing all previous enactments which are inconsistent therewith, is a fruitful source of doubt, confusion and entanglement. What again has been more prolific of unprofitable litigation than the Acts relating to the Property of Married Women? Instead of a comprehensive, well defined and clearly-expressed law on this most important subject, we find a conglomeration of sections which have put all the Courts at arm's length in the several interpretations given thereto. We can hope for no

CERTAINTY IN THE LAW—SECULAR V. RELIGIOUS EDUCATION.

reconciliation of these diverse judicial views, till the whole subject is authoritatively passed upon by the Court of Appeal, or by the Supreme Court. At least one clause in the Mechanic's Lien Act (that most absurd and hurtful of all illogical legislation) wears a most threatening aspect, portending the necessity of many a pitched battle on every word of it ere it be fully subdued to the uses of the much-enduring public. Then we can turn our regards upon the devastation which the Court of Appeal has wrought (and none too soon) upon the goodly growth of cases that developed the doctrine of pressure to its proudest height in *Davidson v. Ross*. That doctrine, as elaborated by a course of decisions beginning with Vice-Chancellor Mowat's judgment in *The Royal Canadian Bank v. Kerr*, 17 Gr. 47, was finally sublimated to this nicety, that if a debtor on the eve of insolvency crossed the street to one of his creditors, proposed to give him a security, and did give him a security, that transaction was invalid; but if the creditor crossed the street to the debtor, suggested that a security should be given and such security was given, that transaction was unimpeachable. It was high time that the daylight of common sense should be let in on these cases; and this has been done by the decision in appeal which has practically abolished the doctrine of pressure as a question of intent.

In conclusion: it is very desirable that an *equilibrium* as between law and equity should be observed and maintained in the *personnel* of the Appellate Courts. The preponderance of either will encourage and has already encouraged appeals. But with Courts of Appeal well-organized and well-balanced we see no reason to fear that their decisions will command and deserve respect; and that they will secure satisfaction of that practical sort, which shall obviate all necessity for carrying any of our appeals to England.

SECULAR v. RELIGIOUS EDUCATION.

A curious question has arisen and been decided in the Supreme Court of Vermont. It appears that the complainants were members of the Catholic Church in the village of Brattleborough, and that on June 4th, 1875, the priest of the said church, acting in behalf of the complainants, sent to the respondents, who were the prudential committee of that school district, a request that the Catholic children might be excused from attendance at school on "all holy days," and especially on that day, being holy Corpus Christi day. To this note the committee replied that the request could not be granted, as it would involve closing some of the schools and greatly interrupting others.

It further appeared that about sixty Catholic children, by direction and command of their parents, were kept from school to attend religious services on said 4th of June, being, as stated in the bill, "holy Corpus Christi day." A few of them applied for admission to the schools in the afternoon of that day, and all, or nearly all, so applied the next morning. They were thereupon told by the committee that, as they had absented themselves without permission, and in violation of the rules of the schools, which they well understood, they could not return without an assurance from their parents, or their priest, that in future they would comply with the rules of the schools. The committee assured the children, and many of their parents, and also the priest, that if they would promise that the schools should not again be interrupted in like manner they would gladly re-admit said children; but the priest and parents refused to comply with such proposal, and claimed that on all days which they regard as holy they might, as matter of right, take their children from

SECULAR V. RELIGIOUS EDUCATION.

the schools without any regard to the rules thereof.

The bill prayed an injunction against the committee from preventing the admission of the complainants' children to the said schools, &c.

The judge who delivered the judgment of the Court dismissed the bill, in effect holding, as stated in the head-note of the case (*Ferriter et al. v. Tyler et al.* 15 Am. Law Register 570), that it was the right of the directors of the public schools to prescribe the hours of attendance of the pupils, and to make a proper system of punishment for absence, &c: that in doing this the public rights and convenience must govern, without regard to the wishes or convenience or private preference of parents or others: that this rule applied to the attendance of the children on public or private religious worship on week-days during the prescribed hours for school, and that such purpose did not excuse violation of the rules of the school.

One of the editors of the *American Law Register* in commenting on the case very fairly states the questions involved in the following manner: (1.) Whether, in case of conflict, the conductors of the school may lawfully insist upon their rules and regulations, setting aside those of the church where the children receive religious education; in other words, how far school education may interfere with or supersede religious education? (2.) How far the school laws or regulations will control the right of the parents to direct the attendance of their children upon religious services, and expose the children to punishment for obeying their parents in this respect?

The consequences that would flow from these questions being answered in the way they were answered by the Supreme Court of Vermont, seem to us most appalling, and present a picture most dis-

couraging to those citizens of the United States, who have any regard for the future welfare of their country. These latter may be glad to see so monstrous a doctrine combatted by such an eminent jurist as Hon. Isaac F. Redfield of Boston, who in commenting on the case says:

"There can be no doubt that in this case the children were required to disobey their parents, and were punished for not doing so. They might as well have been subjected to corporal punishment as to exclusion from school. Then the case would have been precisely parallel with that of *Morrow v. Wood*, 13 Am. Law Reg. N. S. 692, and the able and judicious opinion of Mr. Justice Cole would fully apply to this case. Since the common schools have been compelled, by the contrariety of opinion upon religious subjects in the country, to virtually abandon all instruction upon the subject, it must not be expected that it can be also tolerated in a Christian country, that they should be allowed to teach positive irreligion, or what directly conflicts with Christian teaching upon morals. The first great command of the Decalogue, as to our duty to each other, is, "Honor thy father and thy mother." There could then be nothing more in conflict with Christian teaching than to require the children to disobey their parents. It is creditable, we think, to the Roman church that their children were too well taught in their primary duty to their parents to obey the school, when it came to a conflict between the school and their parents. It is greatly to be feared that we are all quite too indifferent to the general effect of so magnifying the authority and wisdom of the common schools in the eyes of the children, above their parents, in all matters even remotely pertaining to education, and at the same time teaching the children that mere text-book knowledge is superior to all other attainments. There can be little doubt, this may have contributed more than we comprehend to that general disregard and disrespect among the young toward their elders, which is so much deplored by many. But when it comes to the matter of religious teaching, which is so exclusively under the control of the parents, and by the very organic law of the state made sacred above all other rights, it might be supposed no one could fail to comprehend the unreasonableness of the claim here made. What is said in the Constitution of the State about the duty of maintaining schools, and the consequent necessity of their claims being vindicated by the courts, is all very well. But

SECULAR V. RELIGIOUS EDUCATION—LAW SOCIETY.

it must be remembered that the provisions in the Constitution about schools are subordinate to those securing freedom of religious worship. And if we make the case under consideration our own, we shall all be able to comprehend that the demands of the school authority here were most unreasonable and without either law or necessity. We think it unfortunate, both for the interests of the schools and the quiet and good order of the country, that any class of Christians should have been subjected to such hard measures in defending religious freedom, the thing above all others of which we boast the loudest. It seems to us far wiser to mete out to all the most liberal measures upon this subject, especially where, as in the present case, it must be conceded by all that they offer a very plausible, if not, as we think, an invincible legal vindication of their claim. By so doing we shall be able to secure the support of the clearest popular conviction in support of the decisions of the courts, in refusing all countenance towards clearly unreasonable and illegal demands of that character.

We have something perhaps to learn from these sensible remarks in connection with our own common school system. The sentiments of Mr. Redfield on this vital question are entirely in accord with our own views, and are so well and forcibly expressed that we shall not weaken his argument by enlarging upon it.

LAW SOCIETY.

TRINITY TERM, 40th VICTORIA.

The following is the *resumé* of the proceedings of the Benchers during this term, published by authority :

Monday, 28th August.

The Treasurer read a letter from Judge Sinclair of Hamilton, resigning his position as a Benchers.

Ordered, That the Treasurer acknowledge the letter, expressing the regret of the Benchers for the loss of Mr. Sinclair's services, that the resignation be accepted,

and a call of the Bench made for the last Friday in term, for the election of a Benchers in his place.

Messrs. Rye, Lennox, Archibald, Purdon, and Doherty, were called to the Bar. Messrs. Miller, Morton, and Ogden were granted certificates of fitness without an oral examination.

The petition of Mr. Steele was read.

Ordered, That Mr. Steele be exempted from the Preliminary Examination under the special rules for call to the Bar, adopted 27th June last.

The petition of Mr. S. B. Hall was read.

Ordered, That Mr. Hall be allowed his second examination.

A special committee consisting of Messrs. McMichael, MacLennan, and Meredith, were appointed to take examinations of certain attorneys who have applied for call to the Bar under special rules.

Tuesday, 29th August.

The report of the special examining committee on the examinations of Messrs. McKenzie, Macdonald, and Essory, that these gentlemen were duly qualified, was received and read.

Ordered, That they be called to the Bar.

On petition of Joseph John Curran, Esq., it was ordered that he be allowed to practise as an Attorney and Barrister on payment of his certificate fees for current year, and his arrears of term fees.

The petition of Mr. Rye for the return of the fee of two hundred dollars, paid by him under the special rules, on the ground that he had taken steps for the introduction of a Bill for his call, and should be exempted from the payment of that fee, was granted.

Ordered, That Messrs. Macdonald and Essory, on the same grounds, be exempted from the payment of the fee of two hundred dollars required by the special rules.

LAW SOCIETY.

Report of the examining committee was received and read.

The report of the committee on Legal Education on the Preliminary Examinations of the Society was adopted.

The consideration of the questions affecting the Law School was adjourned until Saturday, the second September, notice to be given to each Benchers by the Secretary.

Mr. Evans was appointed examiner for next term, and his fee for this term was ordered to be paid.

The abstract of balance sheet for the second quarter of 1876 was laid on the table.

Messrs. McKenzie, Macdonald, Esory, and Lennox were called to the Bar.

The Treasurer read a communication from the Barristers' Society of Nova Scotia, on the subject of the formation of a Dominion Law Society.

Ordered, That the Treasurer do reply to the communication and express the willingness of the Law Society of Upper Canada to co-operate.

A resolution was adopted, directing copies of the Reports of the Superior Courts of Ontario to be sent to the Judges of the Supreme Court of the Dominion, commencing with the current volume.

The Treasurer read a communication from N. C. Moak, Esq., of Albany, U. S., which accompanied a donation of a number of volumes of law books to the library.

Ordered, That the donation be accepted, and the thanks of the Society be given to Mr. Moak by the Secretary.

Saturday, 2nd September.

On petition of Mr. Robert E. Wood,

Ordered, That Mr. Wood's examination for call to the Bar be allowed, and his call next term authorized thereon.

The report of the finance committee having reference to the proceedings to be

taken in future in the cases of Attorneys who neglect to take out their annual certificates, was adopted.

The report of the committee on Reporting was presented by the chairman, and was adopted.

The report of the committee on Legal Education was presented by the chairman.

Mr. Richards then proceeded with his resolution for the abolition of the Law School, which was lost.

The report on Legal Education was then taken up.

Resolved, that the examiners and lecturers shall be in future elected for four years each, subject to removal at the discretion of Convocation, but at the election now to take place, one shall be elected for one year, one for two years, one for three years, and one for four years; that after this election no examiner and lecturer shall be eligible for re-election.

That the subjects of the lectureships shall be as follows: Real Property, Equity, Common and Commercial Law, Criminal Law and the Law of Torts.

Mr. Charles Moss was elected President of the Law School, and to lecture on Common and Commercial Law.

Mr. Mulock was elected to lecture on Equity.

Mr. Ewart was elected to lecture on Real Property.

Mr. Delamere was elected to lecture on Criminal Law and the Law of Torts.

Ordered, That rule 38 of the general rules be rescinded, and that all candidates for examination as students or articled clerks be examined both orally and in writing at the same time.

The further consideration of the report of the Legal Education committee, was postponed until Friday, 8th September.

Friday, 8th September.

The petition of Mr. C. A. Meyers to

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be allowed a service of two years while he was in the office of Mr. Millard, articles between them having been prepared and inadvertently omitted to be executed until after the two years had expired, was granted and his service allowed.

Mr. Roe's petition to be admitted an attorney under the special rules, was refused.

Mr. Morrow's petition to be allowed his second intermediate examination, was granted.

Æmilius Irving, Esq., Q.C., was elected a Bencher in the place of Judge Sinclair, resigned.

Mr. Armour gave notice that he would move on the first Monday of next term to abolish the Law School.

Mr. McCarthy gave notice for the same day for the reconsideration of the rules adopted in reference to barristers and attorneys.

Mr. Hodgins brought up again report of Legal Examination committee. Report to stand for the same day.

Mr. Martin gave notice for the same day of a motion that students attending the Law School shall pay a fee therefor, and also for the reconsideration of the report on primary examinations.

Mr. McKellar gave notice for the same day of a motion to reduce the annual certificate fee.

SELECTIONS.

JUDGES OF THE ENGLISH APPELLATE COURTS.

No time has been lost in the selection of the judges for the Ultimate and Intermediate Courts of Appeal. The expedition used in their appointment is most laudable, because it is very necessary that ample time should be allowed for conference and correspondence between the judges before next November, with reference to the arrangement of business and the formation of new rules. It is obvious that much care and foresight will be

wanted to ensure the despatch of judicial proceedings under the altered state of things contemplated by the new Act. The revolution effected by it does not fall very far short of that already accomplished by the Judicature Acts, and we have no doubt that the judges will devote a large portion of their leisure in the month of October to the consideration of what is to be enacted by them in the shape of rules and orders.

At present, however, we are concerned with the appointments made. The promotion of Mr. Justice Blackburn to be a lord of appeal will be received with universal approbation. For many years his lordship has been before the profession and the public. His great rapidity of discernment, his learning, and his experience are known to every one familiar with Westminster Hall. His keen sense of justice, love of right, and high-mindedness cannot be too highly appreciated. His one fault—namely, excessive eagerness to get at the point of the case, and to leap to a conclusion on it—will disappear altogether in the serene atmosphere of the House of Lords. His lordship will be much missed in Westminster Hall. Some members of the bar were repelled by the brusque manner of the learned judge; but all men capable of seeing beneath the surface found in him the true spirit of a gentleman, the kindest of natures, and the most generous of dispositions.

The Right Hon. Edward Strathearn Gordon, Lord Advocate of Scotland, will be the other lord of appeal, and will supply the place so well filled by the late Lord Colonsay. The presence in the House of a judge thoroughly acquainted with the principles and practice of Scotch jurisprudence is essential, and Mr. Gordon is well qualified to aid their lordships in this respect.

We suppose that the selection of Baron Bramwell, Mr. Justice Brett, and Baron Amplett to be judges of the Intermediate Court of Appeal will be generally admitted to be wise. Indeed, the appointment of Baron Bramwell and Mr. Justice Brett was a foregone conclusion, while the addition of Baron Amplett will equalise the common law and equitable forces in that tribunal. Baron Bramwell has for many years been one of the special favor-

JUDGES OF THE ENGLISH APPELLATE COURTS—CROSS-EXAMINATION TO CREDIT.

ites of the profession. With the bar his popularity could not stand higher. No one who has ever practised before him, whether as a leader or a junior, will forget his consistent courtesy and abundant supply of good humour, or will fail to acknowledge that lofty sense of honour with which his lordship has been ever actuated. In losing him from the High Court of Justice, we have the consolation of knowing that a vast harvest of appeals will still bring the bar into continual contact with him. The solicitors and the suitors have been equally proud of his lordship's talent, discretion, courtesy, and impartiality, and all will wish him well in his new career.

Mr. Justice Brett and Baron Amplett belong to a younger generation of judges; but the former at a very early stage of his judicial life displayed remarkable force of character, coupled with great knowledge of business, and thorough acquaintance with the principles of the law. No one, indeed, has excelled Mr. Justice Brett in knowledge of the general affairs of life, and of everything connected with the trade of the country. Baron Amplett has ever shown himself a laborious and painstaking judge, and we doubt not that he will render much help in the Court of Appeal.

In finding ourselves able to speak in language so eulogistic of the judges now promoted, we cannot but add our apprehension that the High Court will suffer by the withdrawal of so much of its force. But the effect of removing eminent men from the scene of action is generally to give impulse to the efforts of those that follow them. Experience teaches us that this is as much the case with the judicial bench as it is with the aspirants to fame in political life.—*Law Journal*.

CROSS-EXAMINATION TO CREDIT.

Cross-examination constitutes the fine art department of the profession of counsel. It requires ingenuity, caution, delicacy of touch, perception of truth, knowledge of human nature, mastery of the subject-matter. Like painting, sculpture, poetry, and music, it commands a multi-

tude of critics, but boasts a limited number of experts. Like them, also, it is of necessity attempted by a great number of persons who possess few qualifications for the enterprise which they undertake. Unlike them, it is an art practised on human beings, not on canvas and colours, on plastic matter, on ideas and sounds.

Liberty to cross-examine is, beyond all doubt, essential to the discovery of truth; and the necessity for this liberty being uncontrolled, so long as the inquiry is confined to relevant facts, is universally admitted in this country. What is to be the measure of the right to cross-examine on matter irrelevant to the issue of the cause or prosecution has been and is much debated. Recently the controversy on this point has become more general; it has passed from the rules or customs of Court into the region of literary discussion, and it is approaching the stage of legislative ordinance.

Whenever in this country we see anything like agitation with a view to Parliamentary interference, we may be quite sure that there has been some practical abuse of a right or privilege. Our law in every part abounds with anomalies, but hitherto no serious efforts have ever been made to correct these from regard for abstract justice or logical consistency. We have been content to remove or alleviate grievances developed in actual life. If, then, we find the public voice asking for a check on cross-examination to credit, we conclude that the professors of the art have been blundering to the prejudice of the public sense of what is fair.

We know of no judicial dictum which can be cited as containing the rule as to cross-examination to credit. Mr. Fitzjames Stephen in his "Digest of the Law of Evidence" expounds the law with a cold-blooded precision characteristic of codes. "When a witness is cross-examined he may be asked any questions which tend (1) to test his accuracy, veracity, or credibility; or (2) to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in Article 120—namely, where the answer might expose him to a criminal charge or penalty." It might be con-

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tended that this exception really represents the very case in which he ought to be compelled to answer; for, if a man has actually committed a crime, although he has not been convicted of it, his testimony must be open to suspicion. On the other hand, an answer may, according to the ideas of the society to which the witness belongs, involve disgrace, although the act disclosed by it ought not to affect the credit of the witness in the opinion of reasonable men.

If, however, the rule is to be reduced to the dimensions of a rigid definition, we perhaps cannot object to the formula rendered by Mr. Stephen, although we quite appreciate the shock which such a naked statement is calculated to give. Fortunately for the comfort of society, there are many extreme rights which no sane man enforces. No landlord distrains the morning after rent day without grave cause. A lawyer's letter generally precedes a writ of summons. Bargains are made and performed, although the parties might get out of them by the help of the Statute of Frauds. Experience, apart from fairness, teaches that legal rights are doubled-edged weapons, which a man should use carefully. So is it with cross-examination to credit. Counsel may find in his brief material for the injury of a witness; but the business of counsel is to succeed in the cause, and an outrage on the feelings of a witness may be resented by a jury. Arbitrators are notoriously averse to attacks of this class on the credit of witnesses, and it is hardly ever good policy to attempt anything of the kind in the conduct of references. Counsel have also to reckon with the judge; and the strength of strong judges is not wisely provoked to adverse action where jurors and audience would instinctively nod assent to a crushing summing-up. There is also the counsel's own sense of right. Nothing can be more monstrous, than for a counsel to ask a question calculated to torture not only the witness, but a host of innocent persons nearly connected with the witness, merely because the question is in the brief, and the client wishes it to be asked. Counsel is bound in honour and out of respect to himself and his profession to consider whether the question ought to be asked, not whether his client would like it put.

Counsel is not the mouthpiece of spite or revenge. He is not to adopt a line of conduct which, if universally carried out, would drive truth out of Court by intimidating witnesses. Among other considerations, he should weigh with himself whether the expected answer ought to render the witness unworthy of belief on his oath; whether the act to be revealed is of recent date, so as to make it improbable that the witness has repented his misconduct, and striven to amend his ways. In some cases, also, counsel may perhaps consider whether the good to accrue to his client from the answer is not so small as compared with the enormous mischief to be done to the witness, and to other persons, as to justify him in declining to put the question. We admit that no definite set of rules can be prescribed for counsel. He must judge for himself; and he will have the consolation of knowing that he is not very likely to go wrong if he acts on his own opinion, instead of inclining his ear to the remorseless passion or the unscrupulous greed of the party for whom he is retained.

We do not wish to enter upon the task of illustration, although that method is coming so much into fashion. But we may put one or two instances of recent occurrence. A woman gives evidence, not as prosecutrix, against a prisoner on a charge of theft. The witness is asked a question tending to show sexual immorality on her part on a particular occasion unconnected with the theft. The question is altogether unjustifiable. A man prosecutes a policeman for assault with intent to do grievous bodily harm. The prosecutor is cross-examined for the purpose of showing that he has been frequently charged by the police, and that he had the strongest motive for trumping up a false charge by way of revenge against the prisoner. The cross-examination is obviously just, and the necessity of unlimited authority to the counsel to press the witness home on every point with the utmost severity is plainly apparent. Everybody recollects the famous question on the trial of *Orton*, which has generally been held unjustifiable, mainly on the ground that the relations between the sexes have no direct bearing on the probability of the witness telling the truth. In these matters, before a judg-

CROSS-EXAMINATION TO CREDIT—GROWING CROPS AND PERSONAL CHATTELS.

ment can be formed as to the conduct of any man or woman, it is necessary to be thoroughly informed of all the surrounding circumstances; and these circumstances are for the most part unascertainable. Indeed it is much safer to proceed upon the principle that sexual immorality has no bearing at all on the credibility of a witness. We should not allude to this matter, were it not that here we have the very engine by which most important witnesses may be, and indeed are, deterred from coming into Court, to the infinite prejudice of justice.

It is somewhat strange that the notorious Bravo inquest should have given an impetus to discussion on the subject of cross-examination to credit, whereas that case had really nothing to do with the matter. No single question was ever asked during the inquest for the mere purpose of impeaching the credit of a witness. The interrogatories which roused so much, and we may say such universal, reprobation in the Press, were asked as revelant to the issue. They were based upon the theory that the facts disclosed a motive for an assumed crime. Therefore they did not fall within the category of questions which tend to shake the credit of a witness by injuring his character.—*Law Journal*.

GROWING CROPS AND PERSONAL CHATTELS.

A question of more than ordinary importance under the Bills of Sale Act was recently raised in the Common Pleas Division in the case of *Brantom v. Griffiths*, 33 L. T. Rep. N. S., 871. Its importance was due to the terms of the 7th section of that Act, according to which the expression "bill of sale" includes bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of persons as well as power of attorney, authority or licenses to take possession of personal chattels as security for any debt. It also provides that the expression "personal chattels" shall mean goods, furniture, fixtures and other articles capable of complete transfer by delivery, and shall not include * * "any stock or produce upon any farm or lands which

by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale." The only facts of the case which it will be necessary to notice here are few in number. The plaintiff made a claim to certain growing crops, under two instruments by which these crops had been assigned to him. The documents were not registered under the Bills of Sale Act, 1854. The defendant accordingly contended that his claim as execution creditor was good.

In the long series of decisions upon the 4th section of the Statute of Frauds, there will be found a variety of cases in which the question raised was the converse one, namely, whether a sale of growing crops conferred an interest in land within the meaning of the statute. The opinion of Lord Tenterden appears to have been that if the thing would at the time of delivery be a personal chattel, then no interest in the land was conferred. Thus in *Watts v. Friend*, 10 B. & C., 446, an agreement to sell the crop produced from certain seed at a price named, was held to be a contract for the sale of goods within the 17th section, and not a contract conferring an interest in land within the 4th section of the Statute of Frauds. Mr. Justice Littledale has also expressed an opinion to the effect that a sale of any produce of the earth reared by labor and expense, whether it was in a state of maturity or not, provided it was in actual existence at the time of the contract, was not a sale of an interest in or concerning land: *Evans v. Roberts*, 5 B. & C., 829. In another case, however, when a plaintiff had bought timber whilst standing, and was to cut it down, the contract of sale was held to be within the 4th section, although it did not appear when it was to be cut, or what state it was in as to growth at the time of the contract, *Scorrell v. Borall*, 1 Y. & J., 396, and in the same case Baron Hullock distinguished between crops and other articles which are raised by the industry of man; and things, such as trees, which give no annual profit. Although there has been some uncertainty in the law relating to the subject, the principles laid down by Mr. Benjamin in his treatise on

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the sale of personal property, (pp. 88-90) based as they are, on the remarks of Mr. Justice Blackburn (Blackb. on Sales, 9, 10), are substantially correct of these principles; the first is that an agreement to transfer the property in anything attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods, before the property is transferred by the purchaser, is an agreement for the sale of goods, an executory agreement within the 17th section. The second principle enunciated is, that when there is a perfect bargain and sale vesting the property at once in the buyer between severance, a distinction is made between the natural growth of the soil and *fructus industriales*. The former is an interest in land, the latter are chattels. These distinctions have been dwelt upon by Chitty likewise in his work on contracts. He gives at p. 80 the general rule in somewhat similar terms.

We shall now be better able to appreciate the difficulty in *Brantom v. Griffiths*. So far as relates to the provisions of the Statute of Frauds, we have seen that the sale of anything attached to the soil may or may not be a sale of an interest in land according to the time when it is intended that the property should vest in the vendor, and to the nature of the thing sold. We are thus enabled to get to one conclusion, namely, that growing crops are not goods and chattels in point of law for all purposes and under all circumstances. When dwelling upon this point, Mr. Justice Brett quoted with approbation a passage from Williams on Executors (7th edit. p. 709), in which the law is thus stated: "There are certain vegetable products of the earth which, although they are annexed to and growing upon the land at the time of the occupier's death, yet as between the executor or administrator of the person seized of the inheritance, and the heir in some cases, and between the executor or administrator of the tenant for life, and the remainderman or reversioner, in others, are considered by the law as chattels, and will pass as such. These are usually called emblements. The vegetable chattels so named are the corn and other growth of the earth, which are produced annually, not spontaneously, not by labour and industry, and thus are

called *fructus industriales*." In the present case the growing crops had belonged to the occupiers of a farm. The plaintiff, after the assignment, allowed the growing crops to remain on the land. Now, if we proceed upon the analogy of the cases upon the Statute of Frauds, the crops in question were chattels within the 17th section. Besides, at common law a growing crop, produced by the labour and expense of the occupier of lands, was, as the representation of that labour and expense, considered an independent chattel: per Justice Bazley in *Evans v. Roberts* (sup.) quoted in Benjamin on Sales, p. 90. Hence arises the question, should this analogy be applied to cases under the Bills of Sale Act.

In the judgment of Mr. Justice Brett was cited a number of instances where it is stated that growing crops are considered as mere chattels, but his Lordship nevertheless came to the conclusion that "although they are chattels for some purposes they are not so for all, and therefore they cannot be said to be within the Bills of Sale Act because they are chattels for all purposes, nor without the Act because they are chattels for no purposes." He then proceeds to consider whether they are goods. The argument against the contention that they are goods was, that the Act only includes goods which are capable of complete transfer by delivery, and that the statute only applies to things which at the time when the statute is to be applied to them might be delivered and are not, which is not the case with growing crops; these, therefore, are not within the Bills of Sale Act. This view was adopted by Mr. Justice Brett. A decision of the Court of Common Pleas in Ireland (*Sheridan v. McCartney*, 5 L. T. Rep. N. S., 27) in which the contrary was held, was adduced as an authority, but overruled on the ground that Chief Justice Monahan overlooked the real meaning of the provision as to stock or produce which ought not to be removed; "For it seems to me," said Mr. Justice Brett, "to apply to farm stock or produce, which is severed from the land, and which could be delivered, but by agreement or custom is prevented from being delivered, such as straw, and other things of a similar nature." Speaking of the quotation at Westminster of authorities

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from the Irish and Scotch courts generally, his Lordship remarked that "Irish and Scotch decisions, although they ought to be treated with deference, are not binding upon us in the same way as decisions of the courts in this country." The authority of the Irish case quoted had already been questioned by the Court of Exchequer in *Gough v. Everard*, 8 L. T. Rep. N. S., 363, where Chief Baron Pollock said in effect that the decision could be supported only by a liberal interpretation of the statute, and that such an interpretation would be quite inappropriate when the parties were acting honestly. We do not think that the reasoning of the judgments in *Brantom v. Griffiths* is altogether satisfactory, although we think the equity of the case has been met. The weak point in the reasoning of the judgment of Mr. Justice Brett appears to be that there is no sequence between his conclusion that growing crops are not chattels for all purposes, and his instances of cases where growing crops are treated as chattels. Perhaps, too, it is unfortunate that nothing, so far at least as can be gathered from the report of the case, was said of the numerous cases upon the construction of Statute of Frauds. As we have already said, we think the result of the case does no wrong; but we should have been better pleased had the reasoning been more strictly logical.—*Law Times*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

CARROLL V. STRATFORD.

Practice Court—Appeal from.

Held, that an appeal lies from a judgment of the Practice Court to the Court of Appeal on a rule to set aside an award.

[October 24, 1876.—MR. DALTON.]

A rule to set aside an award in favour of the defendants was discharged by the learned judge, sitting in Practice Court. The defendants' costs were then taxed, and judgment entered, when the plaintiff took out a summons for

stay of proceedings, on filing the proper bond, pending an appeal to the Court of Appeal.

H. J. Scott shewed cause, and cited *Brown v. Overholt*, 14 Q. B. 64, to shew that no appeal lies in such a case. It is a matter of discretion with the Practice Court whether it will interfere with an award or not, and its judgment in such a case is therefore not appealable. Even though the plaintiff should establish his right to an appeal, it does not follow that he has a right to have proceedings stayed. In such cases a stay of proceedings is a favor, the granting of which is wholly in the discretion of the judge, and it should not be granted unless special circumstances are shewn entitling the applicant to this relief: *McCleary v. Smith*, 5 U. C. L. J. 212.

Meek, contra. Under the Act as to the Court of Error and Appeal, all decrees of whatever kind of the Court of Chancery are appealable, and by sec. 44 of the A. J. Act of 1873, Common Law has in this respect been put on the same footing with Chancery, so that the case of *Brown v. Overholt* is practically overruled. The amount of costs taxed against the plaintiff is very large, and there is danger of his not being able to recover it from the defendants in case the judgment of the Court of Appeal should be in his favour.

MR. DALTON thought that the intention of the recent legislation on the subject of appeals was to allow an appeal from all decisions of the Superior Courts, and the spirit of modern legislation certainly tends in that direction. He therefore made the summons absolute.

Order accordingly.

ELORA AGRICULTURAL INSURANCE COMPANY
V. POTTER.

Held that where a reference is directed to "the Judge" of a certain county, the senior Judge is the person referred to.

[Oct. 25, 1876.—MORRISON, J.]

This case was referred to the arbitration of "the Judge of the County of Wellington." An appointment under this reference having been given by the Junior Judge of the County, a summons was taken out to set it aside.

W. S. Smith shewed cause.

Osler, contra.

MORRISON, J., made the summons absolute, holding that the word "judge" in the order of reference, must be restricted in its application to the senior Judge.

Ont. Rep.]

CLUXTON V. DICKSON—FITCH V. WALKER—NOTES OF CASES.

[Q.B.]

CLUXTON V. DICKSON.

*Date of added plea—Jury notice filed therewith—*32 Vict., cap. 6, sec. 18.

Held 1. That a plea added after issue joined refers back to the date of the original pleas, and should not be dated as of the day when it is filed.

2. That such plea is a "last pleading" within the meaning of the Law Reform Act, cap. 6, sec. 18, sub-sec. 1, and may have a jury notice filed with it.

[Sept. 30, 1876—MR. DALTON.]

Action on the case. Issue was joined on the 20th March, 1876, and notice of trial given for the Spring Chancery Sittings at Peterborough. The trial was postponed at the sittings, and on Sept. 18th the defendants obtained leave to add a plea, which was filed as of that date, a notice for jury being served along with it. On the day following the service of the added plea, the plaintiff gave notice of trial for the ensuing Chancery Sittings. Cross summonses were then taken out on behalf of the plaintiff to set aside the jury notice and added plea, and on behalf of the defendant to set aside the notice of trial, and to postpone the trial till the Fall Assizes.

Oster shewed cause to the first summons, and supported the second, contending that the added plea was properly dated as of the day when it was filed, under the 77th section of the C. L. P. Act. Even if it is irregular, the plaintiff has waived the irregularity by giving notice of trial. The jury notice is regular, being filed with the last pleading: 32 Vict., cap. 6, sec. 18. The notice of trial should be set aside, as it had been irregularly given after the defendant has filed and served a notice for jury.

W. R. Mulock, contra. If the plea is irregular the jury notice must fall with it, as no order allowing the defendant to file it has been granted. The plea should be of the same date as the original pleas: *Short v. Simpson*, L. R. 1 C. P., 250.

MR. DALTON. It has been the practice of the Courts not to date an added plea, as it is a portion of the original pleas, and relates back to their date, otherwise there would be two sets of pleadings on the record. The plea is, therefore, irregularly dated. I think, however, that it is a "last pleading" within the meaning of the Law Reform Act, and that the jury notice is good. The plaintiff has not waived the irregularity in the plea by serving notice of trial, but he had no right to give such notice for the Chancery Sittings when a jury notice was filed. I therefore discharge the plaintiff's summons, and make the defendant's summons absolute, both without costs.

Order accordingly.

FITCH V. WALKER.

*Ejectment summons—Currency of—*C. S. U. C., cap. 27, sec. 3.

A writ of summons in ejectment, issued on 30th June, is from effete after midnight of the 29th Sept.

[Chambers, Oct. 14-20, 1876.—MR. DALTON and MORRISON, J.]

A writ of summons in ejectment was issued on the 30th June, 1876, and was served on the 30th September, following.

C. R. W. Biggar, for the plaintiff, obtained a summons to set aside the copy and service on the ground that the writ had expired at midnight on the 29th September.

Mr. Bishop (Fitzgerald & Arnold), contra.

MR. DALTON made the order, holding that the C. S. U. C., cap. 27, sec. 3, which provides that the writ "shall be in force for three months," means three months inclusive of the date of the writ. From this order the plaintiff appealed to a judge.

Arnoldi, for the appeal, cited *Scott v. Dickson*, 1 Prac. R., 361; *Leeson v. Higgins*, 4 Prac. R., 340; *Lester v. Garlanda*, 15 Ver., 248; *Webb v. Fairmaner*, 3 M. & W., 473; *Young v. Higgon*, 6 M. & W., 49; *Isaacs v. Royal Insurance Co.*, L. R. 5 Ex., 296; *McRae v. Waterloo Mutual Insurance Co.*, (before Galt, J. not yet reported).

Biggar, contra, cited *Converse v. Michie*, 16 C. P., 167; *Freeman v. Read*, 4 B. & S., 184, 185; *Russell v. Ledsam*, 14 M. & W., 588; *Bank of Montreal v. Taylor*, 15 C. P., 107.

MORRISON, J. discharged the summons without costs, taking the same view of the law as Mr. Dalton, but considering the question fairly open to argument.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED
IN ADVANCE, BY ORDER OF THE
LAW SOCIETY.

QUEEN'S BENCH.

HILARY TERM, 1876.

LAWRIE V. RATHBURN ET AL.

*Registry Law—Omission to index deed—*29 Vict. c. 24—*Confusion of property.*

The plaintiff claimed lot 25 under a deed from the heirs at law of S., the patentee, executed in 1875. Defendants claimed under a deed from

Q.B.]

NOTES OF CASES.

Q.B.

S. dated and registered in 1867, but the registrar had omitted to enter defendants deed in the abstract index, and in consequence, when the plaintiff enquired at the registry office before taking his deed, he was told that the patentee had made no conveyance. *Held*, under 29 Vict. c. 24, D., that the Registrar's omission did not invalidate the registration, or deprive defendants' deed of its priority.

The divisions of a statute, under which the clauses are arranged and classified, may be looked to as affording a key to the construction.

The plaintiff had cut timber on lot 24, which was his, and on lot 25, believing that he owned both lots, and all had been drawn away together to a lake about three miles distant. Defendants' agent took away a quantity, which had been cut on both lots, being forbidden by the plaintiff, who swore that he could have distinguished the timber cut on each lot by the marks, and told defendants' agent so, but that the agent said he would take it no matter where it came from. *Held*, that defendants were liable in trespass for the timber cut on lot 24.

The authorities as to confusion of property reviewed.

JULIA ELIZABETH BLACKMORE, ADMINISTRATRIX OF LEWIS HARROLD BLACKMORE, DECEASED, v. THE TORONTO STREET RAILWAY COMPANY.

Street R. W. Co.—Accident to newsboy—Right of action—Negligence—Contributory negligence.

The deceased, a boy selling newspapers, got on a street railway car at the rear end and passed through the car to the front platform, where the driver was standing. He stepped to one side behind the driver, and fell off or disappeared from the car, there being no step on that side, and was killed by the car running over him. He had said just before that he was going on some distance further in the car, and the conductor at the time stated that he had reported the want of a step to the owners of the railway, but it had not been attended to. There was plenty of room in the car, but it was proved that passengers were always allowed to stand on the platform. It was not shewn that the deceased had either paid or been asked for his fare, but it appeared that newsboys were allowed to enter the cars to sell newspapers without being charged.

Held, that the deceased was lawfully on the car, and being so was entitled to be carried safely, whether he was a passenger for reward or not.

Held, also, MORRISON, J., dissenting, that there was evidence for the jury of negligence on

the part of defendants in the absence of the step, and no such contributory negligence on the part of the deceased as should, as a matter of law, prevent the plaintiff's recovery. A non-suit was therefore set aside.

Upon appeal this decision was reversed, on the ground that unless the deceased was upon the cars as a passenger, on a contract of carriage express or implied, and not as a mere licensee or volunteer, he had no right of action against the defendants for the absence of the step, which was no breach of duty to him, but must take the car as he found it; and that upon the evidence he must be taken to have been a licensee only.

REGINA v. WILLIAM HENRY SMITH.

Indictment for Murder—Evidence of accomplice—Empannelling Jury—Challenge for cause—Trial of.

Upon a trial for murder it appeared that the deceased was found dead in his stable in the morning, killed by a gun shot wound. The prisoner was a hired man in his house. His widow the principal witness for the Crown, testified that she and her husband went to bed by ten o'clock; that afterwards her husband, being aroused by the noise in the stable, got up and went out; that she heard the report of a gun; that a few minutes after the prisoner tapped at the door which she opened; that he said he had done it; that he told her to keep quiet, and give him time to get into bed, which she did; that she waited a few minutes and then gave the alarm, calling the prisoner and another man who was sleeping in the house, who went out together and discovered the body. She also swore that the prisoner had told her he was planning the murder, but that she did not then consider him in earnest. There was evidence, apart from her own, of her improper intimacy with the prisoner, and a true bill had been found against her for the murder.

The jury were told that there was no direct evidence corroborating her testimony; the rule requiring the evidence of an accomplice to be confirmed was explained to them, and they were directed that before convicting they should be satisfied the circumstantial evidence relied upon by the Crown did corroborate her testimony. They convicted. Questions were reserved under C. S. C. ch. 112, whether the widow was an accomplice, and whether there was sufficient evidence to submit to the jury.

Held, that whether she was an accomplice or not, there was no ground for disturbing the verdict.

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Quære, per HARRISON, C. J., whether the widow was an accessory after the fact, and whether if so she was such an accomplice as to require corroboration according to the rule of practice.

Per WILSON, J., she was an accessory after the fact.

After some jurors had been peremptorily challenged by the prisoner, and others directed by the Crown to stand aside, and when only one had been sworn, one M. was called and challenged by the prisoner for cause. At the suggestion of the Court, and with the consent of counsel, M. was directed to stand aside by the Crown "till it was ascertained whether a jury could be empannelled without him, on the understanding that if it appeared necessary or expedient the challenge for cause should be tried in the usual way." After the prisoner had made nineteen peremptory challenges, a jurymen was called whom the prisoner desired to challenge peremptorily. The counsel for the Crown then asked the question if M's competency should be tried in the usual way. The prisoner's counsel objected, but the Judge ruled with the Crown, and he certified that he so ruled because it was in accordance with the arrangement under which the juror was directed to stand aside; that no exception was taking to this ruling; that he was not asked to note any objection to the mode of empannelling the jury; and that he was first asked to reserve the question after the assize had finished, when, upon the consent of counsel for the Crown, it was added to the other questions reserved. *Held*, that the jury was properly empannelled.

MANN ET AL. V. ENGLISH ET AL.

Mortgage—Right of mortgagee to maintain trespass or trover for cutting timber—Liability of wrongdoers.

The first count of the declaration alleged that one B. was the owner of certain lands, described, in fee simple, and mortgaged it to the plaintiffs in fee, subject to a proviso for redemption on payment of \$1,350, and interest, by instalments, as specified: that it was provided in the mortgage that B. should not, without the plaintiffs' written consent, cut down or remove any of the standing timber until the first four instalments of principal and interest up to a certain date should have been paid; and that if default should be made in paying the interest the whole principal should become due. It then alleged a default in payment of principal and interest, and that the defendants afterwards,

without plaintiffs' leave, and against their will, entered on their land and cut down and removed timber and trees, thereby injuring the land, and making it an insufficient security to the plaintiffs for the mortgage debt. There was also a count in trover for the trees.

It appeared that the mortgage was one under the Act respecting short forms, with the ordinary proviso for possession by the mortgagor until default, and a covenant not to cut timber, as alleged. The jury, in answer to questions, found that R. had cut down the timber, the other defendant, E. assisting him, in order to sell it and level the place depreciated: that the damage thus done was \$150; and that defendants did not purchase it from R. (as had been asserted) believing that he was entitled to sell it; but they said, after their verdict had been recorded against both defendants as these answers, that they did not intend to find E. guilty.

Held, that the action was maintainable, and the verdict properly entered against both defendants, the jury having found them to be joint wrong-doers: that the mortgagee was not restricted to his action on the covenant, but might certainly maintain trover; and *Seem* that, though not in actual possession, he might under the circumstances, maintain trespass also.

Quære, whether the first count was in case for injury to plaintiffs' revisionary interest, or in trespass.

*Seem*s, that it was a trespass; but *held*, that it disclosed a good cause of action.

DIGEST.

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FOR FEBRUARY, MARCH, AND APRIL, 1876.

From the American Law Review.

(Continued from p. 292.)

LEGACY.

1. A testatrix bequeathed her personal property to her husband for life, and after his decease to be divided amongst her five children, share and share alike; and if any of her children should die without issue, then that child's share should be divided among the children then living; but if any child should die leaving issue, then that child should take its parent's share. The husband and the five children survived the testatrix, and the children survived the tenant for life. *Held*, that each child was absolutely entitled to a fifth of the property on the death of the tenant for life.—*Olivant v. Wright*, 1 Ch. D. 346; s. c. L. R. 20 Eq. 220.

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2. A testatrix bequeathed one moiety of her property in trust to pay the income to her daughter A. for life, and the other moiety in trust to pay the income to her daughter B. for life; and she directed her trustees to stand possessed of one moiety of her estate immediately after the death of A., and of the other moiety after the death of B., in trust to pay, transfer, and assign the same unto and amongst all and every the child or children of A. living at the time of A.'s decease, and the issue then living of any child or children of A. who should have died in A.'s lifetime, and all and every the child or children of B. living at the time of B.'s decease, and the issue then living of any child or children of B. who should have died in B.'s lifetime, to be equally divided between them; and if there should be but one such child, and no issue of any deceased child, or no such child, and only one grandchild, or such other issue, then the whole to such one child, grandchild, or other issue; the issue of any deceased child to take the same and no greater share than his, her, or their parent or parents would have been entitled to if living. A. died leaving ten children and one grandchild, the issue of a deceased child; and B. died leaving two children and six grandchildren, the issue of a deceased child. It was contended, that, upon the death of A., one moiety of the property became divisible between A.'s children and grandchild; and that, upon the death of B., the other moiety became divisible between her children. *Held*, that the entire property was divisible upon the death of the survivor of A. and B., and must be divided into fourteen parts, A.'s grandchild taking one-fourteenth, and B.'s six grandchildren taking one-fourteenth, as a class.—*Swabie v. Goldie*, 1 Ch. D. 380.

See CHARITABLE BEQUEST; CONDITION, 1; DEVISE; EXECUTORS AND ADMINISTRATORS; ILLEGITIMATE CHILDREN; MARSHALLING ASSETS; WILL, 4.

LETTER.—See CONTRACT, 2; LIMITATIONS, STATUTE OF.

LEX FORI.

A pier at Marbella, in Spain, belonging to an English company, was injured by an English steamship. By the law of Spain, in such cases the master and mariners of the ship, and not the ship or her owners, are liable in damages. The company instituted a cause of damage in England against the steamship. *Held*, that the law of England, and not that of Spain, governed the case.—*The M. Moxam*, 1 P. D. 43.

LEX LOCI.—See CONTRACT, 2; LEX FORI.

LIBEL.—See DEFAMATION.

LIEN.

W. was appointed agent of a company to sell its goods, and the company was to be at liberty to draw bills upon W. for such a reasonable amount as was represented by the goods on W.'s premises. Should W. not have

sufficient funds in hand to meet the bills, the company undertook to remit the amount to make up such deficiency. The company drew bills on W., which he accepted. Before the bills became due, the company filed a petition to wind up. *Held*, that W. had a lien on the goods in his possession for the amount of said bills.—*In re Pavy's Patent Felted Fabric Co.*, 1 Ch. D. 631.

LIFE INTEREST.—See APPOINTMENT; DEVISE, 2. LIMITATIONS, STATUTE OF.

To an action for work done the defendant pleaded the statute of limitations. The plaintiff, to show an acknowledgment of the debt, put in evidence the two following letters written to the plaintiff within six years before action began: "I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders until this be done. S."—"You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week." No account was sent in. *Held*, that the debt was taken out of the statute.—*Quincey v. Sharpe*, 1 Ex. D. 72.

LIGHTS.—See SHIP.

LUGGAGE.—See CARRIER.

MAINTENANCE.—See CHAMPERTY.

MAINTENANCE AND SUPPORT.—See TRUST.

MARRIAGE.

S., who had enjoyed a champagne-supper with W. and his family, knelt on one knee before a daughter, took a wedding-ring from his pocket, and placed it on the daughter's third finger, and said to her, "Maggie, you are my wife before heaven, so help me, O God!" and the two kissed each other. The daughter said, "Oh Major!" and put her arms round his neck. S. and the daughter were then "bedded" according to an old Scotch fashion, which seems to consist in throwing a pillow at the parties. Cohabitation and a boy followed. *Held*, that on the above facts, and all the circumstances of the case, no marriage was contracted under the Scotch Law.—*Stewart v. Robertson*, L. R. 2 H. L. Sc. 494.

MARRIAGE, RESTRAINT OF.—See CONDITION.

MARRIAGE SETTLEMENT.—See ELECTION, 2; SETTLEMENT.

MARSHALLING ASSETS.

The personal estate of a testator not specifically bequeathed was insufficient to pay his funeral and testamentary expenses and debts. *Held*, that as between pecuniary legatees, specific legatees, and specific devisees, the pecuniary legacies were the primary fund to supply the deficiency.—*Tomkins v. Colthurst*, 1 Ch. D. 626.

See PARTNERSHIP.

MASTER AND SERVANT.

The plaintiff, a licensed waterman and lighterman, was in the employ of the defend-

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ant, a corn-merchant and warehouseman, and owner of several barges. It was the plaintiff's duty to attend to the mooring and unmooring of barges: and there were two ways of passing from the defendant's premises to the barges, viz., by going down certain stairs to the water at the end of a street, and thence by wherry to the barges; or by going from the defendant's warehouse through a doorway to the barges, the latter being the way the plaintiff usually adopted. The plaintiff, on leaving defendant's premises by said doorway, was injured by a sack of peas falling on him through the negligence of the defendant's men. *Held*, that the defendant was not liable. —*Lovell v. Howell*, 1 C. P. D. 161.

MORTGAGE.

1. Mortgagees, being of opinion that their security would be insufficient to pay their debt, proved their whole claim against the mortgagor, who was in bankruptcy, and received a dividend under a compromise made without prejudice to securities, and under which the bankrupt's estate was relieved from further liability to creditors. Subsequently the mortgaged property proved sufficient to pay the whole of said mortgagee's debt, and to leave a surplus. There were subsequent mortgagees of said mortgaged property, who claimed that the dividend received by the prior mortgagees should enure to their benefit. *Held*, that said dividend must be repaid to the bankrupt's estate for the benefit of the general creditors.—*Sawyer v. Goodwin*, 1 Ch. D. 851.

2. Gray mortgaged Blackacre to Oliver, and subsequently to other parties. Each mortgagee had notice of every other mortgage. Gray then mortgaged Whiteacre to Baker. Baker agreed with Gray to pay off Oliver's mortgage; and Gray agreed to concur with Oliver in a transfer of Oliver's mortgage to Baker, and to give a charge on his equity in Blackacre, subject to the said other mortgages upon it. Oliver's mortgage was accordingly transferred to Baker, who paid to Oliver the amount due on his mortgage. Baker then filed a bill praying a declaration that he was entitled to consolidate his two mortgages, and that the subsequent mortgagees of Blackacre were not entitled to be paid until both his mortgage-debts were paid. *Held*, that Baker was not entitled as against the subsequent mortgagees of Blackacre to consolidate his two mortgages. —*Baker v. Gray*, 1 Ch. D. 491.

3. A testator directed that his debts should be paid, and then devised a certain estate to J., one of his executors, subject to and chargeable with the payment of the testator's debts. J. mortgaged said estate to C., and used the mortgage money for his own purposes. C. had no notice of the purpose to which J. intended to apply the mortgage-money. *Held*, that the mortgagee held the estate free from any charge for the payment of the testator's debts.—*Corser v. Cartwright*, L. R. 7 H. L. 731; s. c. L. R. 8 Ch. 971; 8 Am. Law Rev. 547.

See CONTRACT, 1; COVENANT; DEVISE, 1, 5.

NAME.

Provision in a devise that the devisee must take the arms and name of G. *Held*, that the name of G. must be taken and used after the previous name of the devisee. Using it before the devisee's surname was not a compliance with the condition. —*D'Eyncourt v. Gregory*, 1 Ch. D. 441.

NEGLECTANCE.

The defendant, an agistor of cattle, placed the plaintiff's colt in a field with several heifers, and the colt was there killed by a bull. The bull belonged on land adjoining the defendant's field, but separated from it by a narrow ditch. The defendant knew that the bull had been several times found on his land, the ditch not being sufficient to keep him out; but there was no evidence that the bull was of a mischievous disposition. The jury found the defendant guilty of negligence. *Held*, that the defendant was liable, although ignorant of the mischievous disposition of the bull.—*Smith v. Cook*, 1 Q. B. D. 79.

See MASTER AND SERVANT; SHIP.

NOTICE TO REPAIR.—See LEASE, 1.

PARISHIONER.

"Parishioner" takes in, not only inhabitants of the parish, but persons who are occupiers of land, that pay the several rates and duties, though they are not resident and do not contribute to the ornaments of the church.—*Etherington v. Wilson*, 1 Ch. D. 160.

PARTNERSHIP.

By partnership articles, D. was to be a partner with A. and B. in profits, but not in the capital stock, and he was not required to find any capital. D.'s partnership was to continue for twelve years, at the expiration of which term his interest in the concern was to cease. If D. died during such term, his representatives were to receive a proportionate part of his share of the profits of the current half-year for the period up to his decease, to be ascertained according to the average of the last two preceding half-yearly stock-takings. D. died; after which the business was carried on by A. and B. until A.'s death, and then by B. alone. A creditor of the firm, in respect of a debt contracted while the firm consisted of A., B., and D., claimed to have the whole of B.'s estate applied in payment of all the creditors of A., B., and D., without regard to whether their debts were contracted before or after the death of D., or before or after the death of A. There were in existence specific assets which had belonged to the firm while it consisted of A., B., and D. *Held*, that, under the partnership articles, D.'s executors had a right to have the debts existing at D.'s death paid out of the then existing assets; that the assets then on hand, and now existing *in specie*, must therefore be applied in payment of the creditors of the original firm of A., B., and D., and that, therefore, such creditors could not take B.'s separate assets until his separate creditors had been

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paid in full.—*Ex parte Dear. In re White*, 1 Ch. D. 514.

See BANKRUPTCY, 3.

PAYMENTS, APPROPRIATION OF.—See APPROPRIATION OF PAYMENTS.

PECUNIARY LEGATEE.—See MARSHALLING ASSETS.

PEER OF ENGLAND.

A Peer of the British Parliament is not incapacitated from acquiring a domicile in a foreign country by reason of his duty to advise the Queen when she calls upon him for advice, or to attend the House of Peers whenever his attendance there is required.—*Hamilton v. Dallas*, 1 Ch. D. 257.

PER CAPITA.—See LEGACY, 2.

PERPETUITY.—See CHARITABLE BEQUEST; SPECIFIC PERFORMANCE.

PER STIPES.—See LEGACY, 2.

PERIL OF THE SEAS.—See DANGER OF THE SEAS.

PRINCIPAL AND AGENT.—See BROKER; CONTRACT, 3.

PRIORITY.—See PARTNERSHIP.

PROMISSORY NOTE.—See BILLS AND NOTES.

PROVISO.—See CONDITION, 1; SETTLEMENT, 2.

PROXIMATE CAUSE.—See CHARTERPARTY, 1.

PUNISHMENT, ETERNAL.—See CHURCH OF ENGLAND.

REINSURANCE.—See INSURANCE, 1.

REMAINDERMAN.—See DEVISE, 5.

REPUGNANCY.—See SETTLEMENT, 2.

RESULTING TRUST.—See SETTLEMENT, 1.

REVERSIONARY INTEREST.—See APPOINTMENT; EJECTMENT.

RIGHT OF WAY.—See WAY.

SALE.—See BANKRUPTCY, 2-4; CONTRACT, 3; DEVISE, 5.

SCOTCH MARRIAGE.—See MARRIAGE.

SEAWORTHINESS.—See INSURANCE, 4.

SECURITY.—See BANKRUPTCY, 6, 9; MORTGAGE.

SETTLEMENT.

1. Real estate was settled to such uses as A. and B. should by deed jointly appoint and subject thereto to the use of A. for life, remainder to the use of B. for life, remainder to the use of the first and other sons of B. successively in tail male, with remainder over. A power of sale was invested in four trustees exercisable at the request of A. and B., and the proceeds of any sale under this power were to be settled to the same uses as the property sold. A. and B., in exercise of their power of appointment, appointed a portion of said real estate to certain persons in trust for sale, and to stand possessed of the proceeds upon trusts to be declared in an indenture.

No indenture was ever executed. It appeared from other evidence that the power was exercised to avoid the trouble and expense of calling on the trustees to sell. *Held*, that it sufficiently appeared, from the settlement and appointment by A. and B., that there was to be a resulting trust of the proceeds of said sale for the benefit of those who were to take under the settlement, and that said evidence showed that such was the intention of A. and B.—*Bidduph v. Williams*, 1 Ch. D. 203.

2. A fund was settled by W. upon trust for his illegitimate daughter for life, and, in case she should die unmarried, in trust for her, her executors, administrators, and assigns; and it was provided that if any estate, interest, or benefit, should, under the trusts, powers, and provisions of the settlement, be undisposed of, or, in the events which should happen, should, but for this proviso, be held upon trust for the crown, or belong beneficially to the crown, then such estate, interest, or benefit, should be held in trust for W. for life, and, after his decease, in trust for W.'s wife absolutely. The daughter died unmarried and intestate. *Held*, that the daughter was absolutely entitled to said fund at her death; and that said proviso was consequently repugnant to law, and void; and that the crown was therefore entitled to the fund.—*In re Wilcox's Settlement*, L. R. 1 Ch. D. 229.

3. By a post-nuptial settlement, reciting that D. was desirous of making provision for his wife and his children by her, D. settled property upon trust to pay the income to his wife for life, and, after her decease, in trust for all and every the child and children of D. by his wife begotten or to be begotten, who, being a son or sons, should attain twenty-one, equally to be divided among them and their respective executors and administrators; and, if there should be but one such child, the whole to be in trust for such one or only child, and his or her executors and administrators; and there was a provision concerning the application of the dividends of the presumptive share of every child "towards his or her respective support, maintenance, and education, until such his or her respective share shall become vested, or he or she shall previously die." D. and his wife died, leaving sons and daughters who had all attained twenty-one. *Held*, that the daughters were entitled to share in the property.—*In re Daniel's Settlement Trusts*, 1 Ch. D. 375.

4. By a marriage settlement, £50,000 belonging to the wife was conveyed to trustees to pay the income to the spouses for life, and, on the death of the survivor, to pay over the whole to the child or children as the spouses should appoint. The husband bought certain estates, and borrowed £25,000 of said trust fund to pay the price, securing this sum on said estates; and he afterwards executed an entail of the estates. The spouses subsequently by deed appointed that the £25,000 secured as aforesaid should "be settled on and belong to our eldest son and other members of our family in succession, being heirs in possession of the entailed estates." Said sum was also referred to in the deed as

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the sum which "we have allotted and apportioned, and do hereby allot and apportion as the share of our eldest son, or, failing him, of the heir of entail succeeding to the said entailed estate." The deed also contained this clause: "It being our desire and appointment that said trustees should, immediately on the death of the survivor of us, renounce and discharge said [security on said estate,] and disburden said lands and estates." *Held*, that the eldest son was absolutely entitled to said \$25,000; and that said final clause, expressing a desire, did not take away from the ownership created by the previous clauses. *McDonald v. McDonald*, L. R. 2 H. L. Sc. 482.

5. A husband and wife had three children, A., B., and C. On the marriage of A., an estate called Sonna was settled on said husband and wife for life, remainder to A. for life, remainder to his sons in tail male, and in default, &c., to B. for life, remainder to his sons in tail male. On the marriage of B., an estate called Ballycommon was settled on said husband and wife for life, remainder to B. for life, remainder to his sons in tail male, and in default, &c., to C. for life, and after C.'s death to A. for life, remainder to the second son of A. and the heirs male of his body, and in default to the third, fourth, fifth, and every other son of A., *save and except an eldest son*, severally and successively in tail male, the elder of such sons other than an eldest son to be preferred and take before the younger of such sons, and, in default or failure of such issue, over. A. had one son. B. had no issue. C. had her life-estate in Ballycommon, and died. It was contended that the phrase, "save and except an eldest son," was intended to apply only to the case of a son of A., who had younger brothers, and not to the case of A.'s having an only son. *Held*, that A.'s son was not entitled to Ballycommon.—*Tuttle v. Bermingham*, L. R. 7 H. L. 634.

See ELECTION, 2.

SHAREHOLDER.—*See* BANK.

SHIP.

A sailing vessel under way was overtaken and run down by a steamer. *Held*, that it was not the duty of the sailing vessel to exhibit a light over her stern.—*The Earl Spencer*, L. R. 4 Ad. and Ec. 431.

See CARRIER; CHARTERPARTY; COLLISION;
DANGER OF THE SEAS; FREIGHT; INSURANCE, 1, 2, 4; LEX LOCI; SALVAGE.

SHOP.—*See* DWELLING-PLACE.

SLANDER.—*See* DEFAMATION.

SPECIAL DAMAGE.—*See* DEFAMATION.

SPECIFIC DEVISEE.—*See* MARSHALLING ASSETS.

SPECIFIC LEGATEE.—*See* MARSHALLING ASSETS.

SPECIFIC PERFORMANCE.

Lease for forty years, with concurrent lease for ninety-nine years, if A., B., and C., or any of them, should so long live, with covenant by the lessor to put in another life or lives in place of said A., B., and C., should any of

them die during said forty years. The lease for forty years was void. A. died, and the lessor appointed no life in his place. The lessee brought a bill for specific performance. *Held*, as the only ground for specific performance was that the covenant created an equitable estate at the time of execution of the lease, and as such estate would be for more than three lives, and therefore void by statute, the covenant could not be enforced. Bill dismissed.—*Moore v. Clench*, 1 Ch. D. 447.

STATUTE.—*See* INTEREST; LEASE, 2; WAGER;
WILL, 4.

STEAMSHIP.—*See* CARRIER; COLLISION.

STEAM-TUG.—*See* COLLISION.

SURTY.—*See* BANKRUPTCY, 6.

TACKING.—*See* MORTGAGE, 2.

TENANT FOR LIFE.—*See* DEVISE, 5.

TENANT IN COMMON.—*See* DEVISE, 8.

TICKET.—*See* CARRIER.

TITLE.—*See* LEASE, 2; MORTGAGE, 3.

TRESPASS.

The wife of the brother of a man who had died in a fit of delirium tremens removed certain jewelry belonging to the deceased from the room where he died, and put them in a cupboard in another room for safety. The jewelry was stolen, and the executor of the deceased brought trespass against the brother and his wife. At the trial, the judge directed the jury to find for the defendants. A rule was obtained for a verdict for the plaintiff for one shilling; or for a new trial, if the court should be of opinion that on the above facts the plaintiff was entitled to a verdict. *Held*, that the plaintiff was entitled to recover as the defendants did not show that the removal was reasonably necessary for the preservation of the jewelry. Verdict for one shilling without costs.—*Kirk v. Gregory*, 1 Ex. D. 55.

TROVER.—*See* BROKER, 1; TRESPASS.

TRUST.

Trustees who are authorized to expend a certain sum in the maintenance and support of children may pay the expenses of education from such sum.—*In re Breeds' Will*, 1 Ch. D. 226.

See DEVISE, 6; ELECTION, 1; EXECUTORS
AND ADMINISTRATORS, 2; SETTLEMENT, 1.

UNSEAWORTHINESS.—*See* INSURANCE, 4.

VESTED INTEREST.—*See* DEVISE, 2, 3.

VOLUNTARY SETTLEMENT.

A silk merchant assigned two policies of insurance for £1,000 each upon his life to trustees for the benefit of his wife, and, a year later, assigned to said trustees his household furniture in trust for his wife and children. The trader died eight months later, insolvent. At the time of the first assignment, the merchant was doing a business of £100,000 per annum; but an inquiry showed that his liabilities then exceeded his assets by £1,293,

DIGEST OF THE ENGLISH LAW REPORTS.—REVIEWS.

and that, at the time of the second assignment, they exceeded his assets by £10,726. A creditor, whose debt was contracted after the first but before the second assignment, filed a bill for a declaration that both said assignments were void. No creditor was before the court whose debt was contracted before the first assignment. *Held*, that both said assignments were fraudulent against the plaintiff and other creditors, and void.—*Taylor v. Coenen*, 1 Ch. D. 636.

VOYAGE.—See INSURANCE, 2.

WAGER.

The plaintiff agreed with A. that if he should prove the curvature or convexity to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration to the satisfaction of W., then A. was to receive the sums which the plaintiff and A. had deposited with W. to abide the issue. W. decided in favor of A.; and the plaintiff objected to his decision, and demanded back his deposit. By statute, no suit shall be brought to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event of any wager. *Held*, that said agreement was a wager, and that the plaintiff was entitled to recover back his deposit from W.—*Hampden v. Walsh*, 1 Q. B. D. 189.

WAIVER.—See LEASE, 1.

WARRANTY.—See DAMAGES; INSURANCE, 4.

WAY.

A road to a farm house, farm-lands, and a piece of woodland, had been used immemorially for agricultural purposes. About thirty years before the filing of the bill in this case, a wing was added to the farm-house and a new stable built, and the materials together with sand and gravel were carted over said road; and a few years later the farm-house was altered from a clay tenement into a brick cottage, and the materials carted over the road; the road was also used by persons having the right of shooting on the farm. The tenant of part of said farm-lands prepared to build a house on his land, and a bill was filed praying an injunction. *Held*, that the tenant had no right of way for carting materials for the proposed new house.—*Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch. D. 362.

WILL.

1. Certain alterations in a will bore date prior to the date of the will. *Held*, that, in the absence of further evidence, the alterations must be presumed to have been made after the date of the will, and must be rejected.—*In the Goods of Adamson*, L. R. 3 P. and D. 253.

2. A testator wrote his will in his own handwriting, and concluded it with the words, "Signed, published, and declared by the said Thomas Pearn, the testator, as and for his last will and testament, in the presence of us," &c. The testator in the presence of two witnesses, said that he wrote said clause and the whole will, and the witnesses signed the

will. There was no signature to the will other than that in said attestation-clause. *Held*, that the will was duly executed.—*In the Goods of Pearn*, 1 P. D. 70.

3. A testator directed his residuary real estate to be sold, and the proceeds divided among twelve persons. The testator made a codicil, directing that certain real estate purchased after the date of the will should be disposed of as directed by the will as to said residuary estate. This codicil was attested by A. and B., two of said residuary devisees, after the passage of the Wills Act, which made void devises to attesting witnesses to wills. Subsequently the testator made a second codicil, which he described as a codicil to his last will, but which made no reference to the first codicil. *Held*, that the second codicil did not operate as a re-execution of the first codicil, and that consequently the two-twelfths of the real estate which would have gone to A. and B. under the first codicil, if it had been properly attested, fell into the residue, and must be divided between said twelve residuary devisees.—*Burton v. Newbery*, 1 Ch. D. 234.

4. A will contained a devise of lands to "Elizabeth Ely, her heirs and assigns for ever." Through the words, "Ely, her heirs and assigns for ever," a line had been drawn as if by a pen, and above the erased words was written the word "Ely." *Held*, that there was a revocation of a clause within 29 Car. 2 c. 3, sect. 6; and that the devise was of an estate for life only.—*Swinton v. Bailey*, 1 Ex. D. 110.

See CONDITION, 1; CHARITABLE BEQUEST; DEVISE; ELECTION, 1; EXECUTORS AND ADMINISTRATORS; ILLEGITIMATE CHILDREN; LEGACY; MARSHALLING ASSETS.

WORDS.

"Building."—See COVENANT.

"Composition."—See BANKRUPTCY, 9.

"Dwelling-Place or Shop."—See DWELLING-PLACE.

"Let."—See LEASE.

"Maintenance and Support."—See TRUST.

"Parishioner."—See PARISHIONER.

"Suffering."—See GAMING.

REVIEWS.

LEADING CASES IN CONSTITUTIONAL LAW.

By Ernest C. Thomas, Bacon Scholar of Gray's Inn; late Scholar of Trinity College, Oxford. London: Stevens & Haynes, Bell-yard, Temple Bar. 1876.

This is a neat little volume of about one hundred pages, founded apparently on the success of Indermaur's Epitome of Leading Cases at Common Law and Equity. We can fancy, however, that it has been much more difficult to compile

REVIEWS—CORRESPONDENCE.

inasmuch as there is no extended work from which the cases on the subject can be abridged, but they had to be collected here and there from the Reports at large. The book consists of some forty-six cases with nine brief *excursus* upon the points illustrated by the cases. The latter are not reported at length, but merely consist of what might be called head notes, containing generally a statement of the case, the argument in short, and the points actually decided. We recognize among the cases such old familiar friends as *Ashby v. White*, and *Fabrigas v. Mostyn*, with those famous cases of the *Seven Bishops' Case* and the *Ship Money Case*. As the reading of the majority of the profession is not sufficiently extensive to include an accurate knowledge of constitutional cases, we can safely recommend them to purchase this little volume, whereby they can acquire a sufficiently practical knowledge of the subject. We notice a rather curious error in one of the cases, where Sir William Scott and his brother Lord Eldon are made the same person.

CORRESPONDENCE.

Suggested Amendments of the Law.

TO THE EDITOR OF THE LAW JOURNAL.

DEAR SIR,—Permit me to mention one or two objections, to which it seems to me some of the proposals for the Amendments of the Law, mentioned in the last issue of your paper, are open.

The first proposition is to make a *fi. fa.* lands bind the interest of a mortgagee. As the law at present stands this kind of interest before foreclosure can only be reached under a *fi. fa.* goods, for the obvious reason that the mortgagee's beneficial interest is personalty and not realty in the eye of law. To make a *fi. fa.* lands bind the mortgagee's interest would be a departure from this principle. It is possibly supposed that this would compel purchasers from the mortgagee to search in the Sheriff's office for executions, but does not a *fi. fa.* goods now bind the mortgagee's interest just as effectually

as a *fi. fa.* lands would, and if purchasers can now be found to buy from a mortgagee, notwithstanding, a *fi. fa.* goods in the Sheriff's hands, is it not every bit as likely that they will buy, notwithstanding a *fi. fa.* lands? I do not think the amendment proposed would prevent the mortgagee dealing with the mortgage security to the prejudice of his execution creditor. I would suggest that some provision for compelling the mortgagee to deliver up possession of the security to the Sheriff, or other officer having the execution, would be a more feasible way of meeting the difficulty.

The second proposition I do not think accords with sound principles of justice. An execution creditor and a prior purchaser for value, who has not registered his conveyance, stand on an entirely different footing; the one has advanced his money upon the express security of the land purchased or mortgaged, the other has not. To enable the latter to realise his debt out of the property which another has honestly bought and paid for, merely because that other person has omitted to register his deed—an omission be it observed which in no way prejudiced the execution creditor, or induced him to give credit to the debtor,—seems repugnant to common sense as well as equity.

With regard to propositions 8, 9, and 10, it seems to me the remedies suggested do not go sufficiently to the root of the matter. I would venture to suggest that the right of dower as well as curtesy should be absolutely and beyond a doubt abolished. It may be said that curtesy is already abolished, but the statute is so worded as at all events to afford a peg to hang an argument on, that after the death of the wife, the husband would be entitled to claim, (see however observation of Harrison, C.J. in 37 Q. B. 551.) Doubtless the Chief Justice's view of the statute is correct, but it would be as well to put the matter beyond doubt.

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In lieu of dower I would suggest that a definite proportion of the husband's realty of which he may die intestate should be allotted to the widow absolutely, subject to the claims of the creditors of the husband. And I think the husband should have a similar interest in the lands of his wife.

In conclusion let me draw the attention of your readers to two noteworthy passages from Maine's *Ancient Law*, (4th ed.) At page 273 he says: "The history of Property on the European Continent is the history of the subversion of the feudalised law of land, by the Romanised law of moveables; and though the history of ownership in England is not nearly completed, it is visibly the law of personality which threatens to absorb and annihilate the law of realty." And again at page 283 he says: "In all the countries governed by systems based on the French codes, that is, through much the greatest part of the Continent of Europe, the law of moveables, which was always Roman law, has superseded and annulled the feudal law of land. England is the only country of importance in which this transmutation, though it has gone some way, is not nearly finished."

I would only add to this that all amendments of the law affecting realty should in my humble judgment be made with the distinct intention of bringing the law of realty into accord with that of personality, as far as the nature of the thing will admit. This, I conceive, is the obvious tendency of the age.

G. S. H.

Rate of Interest upon Judgments.

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—By the C. S. of C. c. 58, s. 8, it is declared that "six per centum per annum shall continue to be the rate of interest in all cases where, by the agreement of the parties or by law, interest is payable, and no rate has been fixed by

parties or by law." The usury law having been abolished, parties are at liberty to agree for the payment of any rate of interest. Where it is at a higher rate than 6 per cent., is the agreement to the effect that the higher rate shall be only claimable to the time of maturity, or to the time of subsequent payment?

Can a plaintiff endorse his execution for the higher rate from the date of his judgment? In *Howland v. Jennings*, 11 C. P. 272, and in *Montgomery v. Boucher*, 14 C. P. 45, the higher rate was allowed until judgment—in the latter case at 20 per cent. In both cases it was considered that the rate agreed on was the measure of damages subsequent to the maturity of the notes. In *O'Connor v. Clark*, 18 Gr. 422, the higher rate was also allowed. By the law of England 4 per cent. is the rate prescribed by statute upon all judgments.

The above queries have been suggested by the late case of *Dalby v. Humphrey*, 37 Q. B. 514.

QUERIST.

[1. Parties may agree for a given rate of interest till payment is made, in which case it will run till that time. Or they may agree for a given rate to a certain period, and the interest at that rate will run to that period, but not necessarily at the same rate thereafter.

2. No greater rate than six per cent can be recovered upon judgments. But an interest will run upon the full amount of the judgment which is often interest upon interest.—EDS. L. J.]

Construction of Will.

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—I have met with this extract from a will: "I will and devise to my three daughters the other half (of the fund to be derived from sale of certain land) to be divided in the following manner namely to Kate and Bridget each equal and double the amount of that to

CORRESPONDENCE—FLOTSAM AND GETSAM.

be given to Johanna." Perhaps some reader of your journal will "cudgel" his brain for the construction to be put on it.

Yours,

LAW STUDENT.

Division Courts—Renewing Execution.

TO THE EDITOR OF THE LAW JOURNAL.

SIR,—Are Division Court Clerks entitled to charge for renewals of executions? Their tariff does not appear to make any provision for this duty to be performed monthly at the request of the parties requiring the execution to be kept in force.

Yours, &c.,

A SUBSCRIBER.

[We are inclined to think that the charge could not be sustained. At the same time, it would be most reasonable that such a fee should be allowed. The service has to be performed, and ought to be paid for. In analogous cases in the higher Courts a fee is provided.—EDS. L. J.]

FLOTSAM AND GETSAM.

UNLICENSED PRACTITIONERS.—The Judges of the English County Courts which correspond with our Division Courts have a summary way of dealing with unlicensed practitioners. It is a pity our judges were not clothed with similar powers. The *Law Times* reports the following:

MR. BARROW, the newly appointed judge of circuit 20, sitting recently at the Grantham court, expressed strong views on the subject of Agents in County Courts.

When the judgment summonses came on, a man appeared as agent for the plaintiff in one case, unknown to his Honour, who made an order for imprisonment. Subsequently the same person came up as plaintiff in a case of his own, whereupon his Honour questioned him as to his former appearance. The witness said that he was then acting as agent.

HIS HONOUR.—You came here to appear for a person, and are not an attorney. I have a good mind to commit you to prison. I will not have

any person here who is not an attorney. Do you mean to say that any judge has allowed you to appear here as an advocate?

Witness.—Not as advocate—it was a judgment summons case.

HIS HONOUR then cancelled the order he had made in the case referred to, and said plaintiff might appear at the court himself.

Witness.—Will your honour adjourn it?

HIS HONOUR.—No, I shall not. I will have no agents here unless they are attorneys. Gentlemen have to spend a sum of money which is perfectly frightful in order to qualify themselves as solicitors, and yet these persons come here and take the bread out of their mouths by appearing as agents. No, not in a court that I preside over. I am very glad I found it out. His Honour also announced that if plaintiffs did not choose to appear themselves in judgment summons cases, they would be struck out for the future.

At the close of the court, his Honour remarked to Mr. Thompson, the registrar, that he would not permit any collectors to come there and make applications for judgment summons.

Mr. Thompson asked whether the purchaser of a person's debts would be allowed to appear? The custom was very prevalent in this part of the country for persons who did not care for the trouble of collecting their own debts, to make them over to an agent by assignment, duly executed by deed. The collector then sued in the name of the original owner, and took what measures he could for proving the debts. He asked whether the collectors in such cases would be allowed to appear?

HIS HONOUR said he would consider the question during the circuit. Afterwards he remarked that collectors would not be allowed to come there and act as advocates. But he would not stand in the way of letting them prove their cases, when there had been a real *bona fide* assignment of debts to themselves.

THE LAW'S LONG ARM.—At the Hull police court last week, James Octavius Ward, a merchant, was charged with forging and uttering a bill of lading which purported to refer to a parcel of wool and other merchandise to arrive by the Russian steamer *Korniloff*, Captain Demme. Ward raised money on this bill of lading and absconded. A description of the prisoner was sent to all parts of the world, and eventually Ward was arrested in Fiji. Three times he was

FLOTSAM AND JETSAM.

taken before magistrates and each time discharged for want of evidence; but Sub-inspector Hannan, the Fijian officer, feeling convinced that he was the man for whom a reward of £100 was offered, watched his man from one island to another, and for the fourth time arrested him and charged him with some breach of local law, on which he secured his remand until the authorities at Hull could be communicated with and an officer sent out. Detective Trafford, of the Hull force, was despatched to Fiji. On arriving there he fully identified Ward, and received him into his custody. The officer and his prisoner having arrived in Hull, Ward was taken before the court on the following day. Captain Demme was present, and deposed that the signature on the bill of lading produced was a forgery. He also stated that on the voyage to which the fictitious document referred he brought nothing but grain. This evidence being taken, the prisoner was remanded.—*Exchange*.

THE LAW OF BOOK SALES.—At the Sheffield County Court on Wednesday, says *The Daily News*, the judge, Mr. T. Ellison, had an action before him of a very novel character. The plaintiff, Mr. J. Langley, is a merchant at Hull, and the defendants are Messrs. Smith & Sons, the well-known news agents and book-stall keepers. In March last the plaintiff was at the Victoria railway station, Sheffield, and went to the defendants' book-stall. There he saw two volumes of a work by Jules Verne, each being marked one shilling. He wished to purchase one of them, but the manager of the stall said he could not sell one volume without the other. The plaintiff thereupon took up one of the volumes and tendered half a sovereign in payment. The manager, however, retained two shillings out of the half-sovereign. The plaintiff refused to take the second volume, and brought his action to recover the shilling which the manager had retained. It was contended by Mr. Porritt, who appeared for the plaintiff, that the volumes being exposed for sale, and a price marked upon them, a purchaser was entitled to insist upon buying a separate volume. Even if the plaintiff was compelled to buy the two volumes, the manager had no right to detain the other shilling against his will. His remedy was to sue for the shilling as a debt. For the defendants, it was proved that the second volume had been sent to Hull twice, and been refused. His honor held that as the books were exposed, and a price marked upon them, a purchaser was justified in merely buying one volume. If the

defendants were entitled to the second shilling, they should have sued for it, and not have detained it.^b He gave a verdict for the amount claimed, with costs.—*Exchange*.

SOLICITOR'S LIEN.—The current number of reports contains a case the parallel of which must frequently occur in practice, and which illustrates, in a manner worthy of note, the extent to which a solicitor is entitled to claim a general lien on papers. We allude to the case of *Ex parte Calvert, re Messenger*, 45 Law J. Rep. Bankr. 136. The case was heard by the Chief Judge, on appeal from the County Court Judge, and resulted in a reversal of the decision given in the Court below.

Messenger, the bankrupt, mortgaged to one Mr. Johnson freehold property. The solicitor, Mr. Calvert, acted as solicitor both for the mortgagor and mortgagee. Before and at the time of the mortgage the title-deeds of the property were in the custody of Mr. Calvert, and after the mortgage the deeds were allowed to remain in Mr. Calvert's hands. Upon the bankruptcy of Messenger the property was sold by direction of the trustee, subject, of course, to the mortgage, and the purchase-money was paid to Mr. Calvert. In accounting to the trustee, Mr. Calvert claimed to deduct for his own use a sum of money representing the amount due to him by Messenger, at the time of the mortgage, for professional costs, basing his claim on his legal right to hold the deeds.

Now, it was clear upon the facts that up to the time of the mortgage the solicitor had a good lien on the deeds for his charges. The question, therefore, was whether Mr. Calvert, although he never actually handed over the deeds, at the date of the mortgage, to the mortgagee, was to be regarded in law as having done so, and as having thereby given up his lien. This contention appeared too subtle to the Chief Judge, who preferred to rely on the substantial fact that Mr. Calvert never had let the deeds go out of his possession, and so had done no act to determine his lien. The case of *Colmer v. Ede*, 40 Law J. Rep. Chanc. 185, decided by Vice-Chancellor Stuart, was cited in confirmation of the opinion of the Chief Judge; and, when that case is carefully read, it becomes manifest that the Vice-Chancellor had really adjudicated upon the point presented to the Court of Bankruptcy. The decision seems to be in accordance with good sense, and it certainly cannot fail to be satisfactory to the profession.—*Law Journal*.

FLOTSAM AND JETSAM.

THE BENCH AND ITS CRITICS.—A question of some importance to prisoners was raised at the Edinburgh Police Court a few days ago—namely, whether they commit an offence against the law by criticising the sentence passed on them. A blind man named Callaghan was sentenced to pay a fine of 10s., with the option of three days' imprisonment, and to find £1 caution, or to suffer three days' additional confinement, for the offence of permitting a quantity of foul water to be thrown from his window, which fell on a passer by. The prisoner, as he was being removed from the bar, remarked, "Well, that is a very severe sentence, and it is 'all through spite.'" "Bring that man back to the bar," shouted the sheriff. The prisoner was accordingly replaced at the bar. "Do I understand you, sir," asked the sheriff, "to say that I inflict that sentence through spite?" The prisoner replied that he "never heard of such a sentence for such a trifling matter." "Very well," rejoined the sheriff, "you will be imprisoned for three days for contempt of court." The prisoner as for the second time he was being removed from the bar, remarked, "I will make them repent for it;" and sure enough the sheriff did show subsequent signs of repentance, for he afterwards instructed the clerk of the court to revoke the sentence passed for contempt of court, observing that he "now thought a prisoner was quite entitled to pass an opinion upon his sentence."—*Pall Mall Gazette*.

The rule that an attorney must first write before proceeding to action is a harsh one, inasmuch as he can, even in England, collect no fee for such labor. In *Holmar v. Stevens*, 33 L. T. Rep. 48, an attorney had written and made a charge therefor. A tender of the original debt was made, but the payment of this charge being refused, a writ was issued to collect both debt and charge. Upon a motion to set aside the writ, Willes, J., after referring to those facts, said: "It appears, then, that this writ was issued, not for the purpose of enforcing payment of the client's claim, but for the purpose of exacting payment of what the attorneys had no legal right to. The writ is the commencement of the action, and an attorney has no claim for any letter until a writ is issued. The attorneys having no legal right to charge for the letter, the issuing of the writ for the purpose of exacting payment for it, is merely an abuse of legal process." And Byles, J., added that "the attorney's letter does not prevent the tender of the principal without any costs." An American

attorney of our acquaintance did more wisely. When accounts were placed in his hands, he uniformly sent a letter requesting payment to the debtor, for which service he usually charged twelve and a half cents. This was, as a rule, paid without demur. One man, who was the recipient of such a letter, refused to pay the charge therefor, on the ground that it was not legal. At the same time he tendered the amount of the debt claimed in bank bills. The attorney refused to receive the bills, on the ground that the bank might be insolvent, whereupon the debtor started for the bank, in order to procure "legal tender." A summons was immediately issued and served upon the debtor before he had procured his "legal tender." He paid costs.—*Albany Law Journal*.

A commercial traveller journeying through Normandy halts at a village inn and orders an omelette to be made of six eggs for his breakfast. He is suddenly called away on business, and departs without either eating the omelette or paying for it. Twenty years elapsed before, journeying through Normandy again, he reappeared at this particular inn. The landlord is still alive. "I owe you something for an omelette," begins the *commis voyageur*. "Made with six eggs," adds the landlord; "you do, and with a vengeance!" "Well," pursues the commercial traveller, "here are sixteen francs; that will be pretty good interest on the prime cost of the omelette." "Sixteen francs!" repeats the *aubergiste*, disdainfully. "I want 1,600,000 francs, 12 sous, and 2 liards." "How so?" asked the debtor, aghast at the demand. "Just in this wise," answered mine host. "Those six eggs would have produced so many chickens; by selling those chickens I would have been enabled to buy two pigs; by selling so many pigs I should have been able to buy so many cows; thence so many carts, horses, farms, houses, and so forth. And I intend to sue you for 1,600,000 francs before the tribunal at Caen." The case is duly tried, and for a while matters look dismally for the commercial traveller, when the judge—he is a Norman judge, and a very wary one—intervenes. "I wish," he says, "to ask the plaintiff one question. Were the six eggs broken in order to make them into an omelette?" "They were," says the plaintiff. "Then," adds the judge, "there is an end of the case. The remunerative career of the eggs ceased as soon as they were put into the frying-pan." Verdict for the defendant.—*Exchange*.

LAW SOCIETY, EASTER TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSBOODS HALL, TRINITY TERM, 40TH VICTORIA.

DURING this Term, the following gentlemen were called to the degree of Barrister-at-Law. The names are given in the order in which the Candidates entered the Society, and not in the order of merit:

PHILIP MCKENZIE.
 THOMAS HUNTER PURDOM.
 JOHN TOBIAS LENNOX.
 HEBER ARCHIBALD.
 WILLIAM BURTON DOHERTY.
 FRANCIS RYE.
 ALEXANDER JOHN B. MACDONALD.
 EMMANUEL THOMAS ESSORY.

And the following gentlemen received Certificates of Fitness, namely:

HENRY PETER MILLIGAN.
 IAN ALEXANDER MORTON.
 ALBERT OGDEN.
 J. JAMES KEHOE.
 ERASTUS BLAIR STONE.
 WILLIAM BURTON DOHERTY.
 ALBERT CLEMENTS KILLAM.
 WILLIAM WYLD.
 FREDERICK WILLIAM CASEY.
 W. COSBY MAHAFFY.
 ROBERT EDWIN WOOD.
 JOHN S. L. WADE.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates.

JOHN NICHOLSON MUIR.
 GEORGE CLAYTON.
 ROBERT DOBBERE CAREY.
 WILLIAM GEORGE EAKINS.
 ALEXANDER CAMPBELL SHAW.

Junior Class.

GEORGE MUIRHEAD.
 JOHN S. MCBETH.

COLIN CAMPBELL.
 JAMES HENRY.
 WILLIAM ALEXANDER MACDONALD.
 ALEXANDER DUNSTON MACINTYRE.
 EDWARD N. LEWIS.
 ALFRED CRADDOCK.
 ROBERT A. PRINGLE.
 JOHN R. HANEY.
 JAMES LEAYCROFT GEDDES.
 WILLIAM HUMPHREY BENNETT.
 THOMAS CHASE PATRICK.
 LENDRUM McMEANS.
 ABRAHAM NELLES DUNCOMBE.
 SIDNEY WOOD.
 JAMES B. O'BRIAN.
 BERNARD MCCANN.
 VICTOR CHISHOLM.
 JEFFREY MCCARTHY.
 MANLEY GERMON.
 TREVASSA HERBERT DYER.
 ALEXANDER FORD.
 ALEXANDER STEWART.
 THOMAS H. JONES.
 WILLIAM CHARLES PERRY.
 SYDNEY BERGIN.
 FRANKLIN FORSTER NOXON.

Articled Clerks.

JOHN WILLIAMS.
 ROBERT STRACHAN.

After Hilary Term, 1877, a change will be made in the Preliminary Examinations.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes, Book 3; Virgil, Æneid. Book 6; Caesar, Commentaries, Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition.

LAW SOCIETY, EASTER TERM.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—*Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History Englands (W. Doug. Hamilton's), English Grammar and Composition, Elements of Book-keeping.*

That the subjects and books for the first Intermediate Examination shall be:—*Real Property, Williams' Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.*

That the subjects and books for the second Intermediate Examination be as follows:—*Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 28, Administration of Justice Acts 1873 and 1874.*

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—*Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.*

2. For Call with Honours, in addition to the preceding—*Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.*

That the subjects for the final examination of Articled Clerks shall be as follows:—*Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.*

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—*Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.*

2nd year.—*Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.*

3rd year.—*Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.*

4th year.—*Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.*

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,

Treasurer.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

TO THE BENCHERS OF THE LAW SOCIETY:

The Committee on Legal Education beg leave to submit the following report:

Your Committee have had under consideration the representations made from time to time to the Benchers, and referred to your Committee, respecting the different courses of study prescribed for Matriculation in the Universities, and for Primary Examination in the Law Society, and now recommend:—

1. That after Hilary Term, 1877, candidates for admission as Students-at-Law, (except Graduates of Universities) be required to pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cæsar, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317. Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Canto v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. *Cornellie, Horace, Acts I. and II.*

OR GERMAN.

A paper on Grammar. *Musæus, Stumme Liebe Schiller, Lied von der Glocke.*

2. That after Hilary Term, 1877, candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), be required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or

Virgil, Æneid, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II. and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

3. That a Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

4. That all examinations of Students-at-Law or Articled Clerks be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

OSGOODE HALL, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

J. HILLYARD CAMERON,

Treasurer.

DIARY—CONTENTS—DEATH OF HON. JOHN HILLYARD CAMERON.

DIARY FOR DECEMBER.

1. Fri...Last day for delivering appeal books in Court of Error and Appeal.
3. SUN...Advent Sunday.
7. Thur...Rehearing term in Chancery begins.
9. Sat...Michaelmas term ends. Last day for notice for call.
10. SUN...2nd Sunday in Advent.
12. Tues...Gen. Sess. and Co. Court sittings in every county. Last day for J. P.s to return convictions to Clerk of Peace.
15. Fri...Court of Appeal sits.
17. SUN...3rd. Sunday in Advent.
20. Wed...Trinity College Michaelmas term ends.
21. Thur...University College Michaelmas term ends. Shortest day.
24. SUN...4th Sunday in Advent. Chris. vac. in Chy. and vac. for Judges Q.B. and C. P. sitting singly begin.
25. Mon...Christmas Day. Nom. of Mayors, Aldermen, Councillors, Reeves, &c.
26. Tues...Upper Canada erected into a province, 1791.
31. SUN...1st Sunday after Christmas.

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THE

Canada Law Journal.

Toronto, December, 1876.

DEATH OF HON. JOHN HILLYARD CAMERON.

WITH feelings of the deepest sorrow we record the death of the Honorable John Hillyard Cameron, D.C.L., Q.C., Treasurer of the Law Society of Ontario.

Few men could be so ill spared from the country at large, whilst to the profession the loss seems to be irreparable, and it will be more apparent day by day for many days to come. To those who had the pleasure of his friendship there will be a want which only time can supply, whilst many a business man will be at a loss where to turn for that ripened experience, sound judgment and heart-inspiring counsel and prompt action which has enabled many to weather the storm which seemed ready to overwhelm them. To hear his eloquence, to observe his high intellect, his undaunted courage, his unflagging industry, his force of character, his tact, his universal courtesy, was to admire him; to be in his society was a great and increasing pleasure, and the charm of his manner few could resist. As yet it seems impossible to realise that one whose presence and counsel seemed so necessary in almost every undertaking or institution of any importance in Ontario, will be seen and heard no more. What concerns us most is, that the leader of our Bar, the staunch supporter of his order, the friendly counsellor of the youngest student, as well as the trusted and confidential adviser in matters of the utmost magnitude; the universal referee in matters professional, whose spoken word was accepted without a shade of suspicion alike by his opponents and the Bench; against whose professional honor no whisper was ever heard—is gone from us, at a time when a

DEATH OF HON. JOHN HILLYARD CAMERON—EDITORIAL ITEMS.

man of that stamp seemed so necessary to the welfare of our profession.

The history of Mr. Cameron's life will be the history of Canada for the last thirty-five years; and if it is written as it should be, it will show that, though for the last twenty years he carried a burden of misfortune and financial embarrassment, resulting from a too sanguine temperament, which would have crushed most men to the earth, and which prevented even him from properly asserting himself among his fellows, he bore it so bravely and so uncomplainingly that few knew how it galled his proud nature and sapped his energies, and at last broke down a constitution which seemed to defy the ravages of trouble and fatigue. It will be long before we shall look upon his like again.

The public press has given to the general reader the leading incidents of Mr. Cameron's career. We shall endeavour to supplement this at an early day by some further information interesting to those who now mourn his loss to a profession of which he was one of the brightest ornaments.

Mr. Cameron died at his residence in Toronto, on Tuesday, November 14th, in his sixtieth year, after a brief illness. His funeral, which was attended by all the public bodies and an immense concourse of citizens from various parts of the Province, was, next to that of Sir John Robinson, the largest ever seen in Toronto.

We are indebted to Mr. Cassels, the very efficient Registrar of the Supreme Court, for the report of a case in the Exchequer Court, (*Wood v. The Queen*), in which the following points have been decided as to security for costs:

Held, 1. Where by a letter addressed to the suppliant the Secretary of the Public Works department stated that, he was desired by the Minister of Public Works to offer the sum of \$3,950 in full settlement of the suppliant's claim against the department, an application on behalf of the crown for security for costs was

refused on the ground that the crown could suffer no inconvenience from not getting security, as well as on the ground of delay in making the application.

2. Application for security for costs in this Court must be made within the time allowed for filing statement in defence, except under special circumstances.

The report was received too late for insertion this month, but will appear in full in our next issue.

MR. JUSTICE ARCHIBALD, whose death was announced last month, was the son of the late Hon. S. G. W. Archibald, LL.D., Master of the Rolls and Judge of the Court of Vice Admiralty, Nova Scotia, and was educated at Halifax. He was a special pleader below the Bar for eight years, and was called at the Middle Temple in 1852. He was appointed a Judge of the Queen's Bench in November, 1872, and in February, 1875, was removed to the Common Pleas. Like Lord Blackburn and Sir James Hannen, he was taken from the Junior Bar to be placed on the Bench. He was universally respected by the profession, was painstaking, conscientious and learned, with a large experience. He died at the comparatively early age of fifty-nine, having in his short career on the Bench displayed the highest judicial qualities.

THE *Law Times* calls attention to the growing disinclination of the best men at the Bar in England to go on the Bench. The encouragements to go there are not sufficient, the work being enormous and the salaries inadequate. If the salaries in England are too small, what must they be with us? Any Minister of Justice would deserve well of his country were he largely to increase the judicial salaries here. We may echo the desponding words of the *Law Times*: "It is impossible to look without apprehension to the necessities which must shortly arise and

EDITORIAL ITEMS—LAW SOCIETY.

the appointments which will have to be made." Let the remedy be applied before it is too late. What was a fair salary here a quarter of a century ago, is now a paltry pittance, which any man at the Bar of any eminence would naturally decline to accept, but for the honour of being made a target for the abuse of disappointed suitors or enraged politicians. This disinclination to accept an office the acquisition of which ought to be a barrister's highest ambition, is a grave misfortune, and is a subject much more worthy of consideration than many of the petty matters which engross the attention of our rulers.

THE first part of the "Rough draft of the Revised Statutes of Ontario, being a consolidation of the Acts of the Legislature of Ontario, with such of the Acts of the late Province of Canada as relate to matters within the jurisdiction of the Legislature of Ontario," (to use the language of the title page,) has been distributed for the information of members and others, and for the purpose of receiving suggestions from any quarter before the review of the work by the Statute Commissioners and its submission to the Legislature. If this review of Part I.—the rest of the volume not yet being issued—is to be more than a mere formal endorsement of the labours of the working men on the Commission, it will be sharp work to have the revision of the whole ready for the Legislature at its next session. We have every reason to believe that those who have this matter in hand are endeavoring to push the work with all speed. We can well understand its tedious and laborious nature, and though a consolidation will be of immense service, it will be far better to make it as perfect as possible, than so to hurry it as to necessitate further legislation. If it cannot be done we shall not grumble, if it can, we shall be proportionately pleased.

LAW SOCIETY, MICHAELMAS TERM, 1876.

ELECTION OF TREASURER.

At the first meeting of convocation, this Term, the Benchers proceeded to elect a Treasurer in place of Hon. John Hill-yard Cameron, whose loss we have referred to in another place. The choice of those present fell upon Hon. Stephen Richards, Q.C. We congratulate him upon his appointment to so high and honourable an office. The selection of Mr. Richards will be quite acceptable to the Bar, who thoroughly appreciate his sterling qualities of head and heart, his scrupulous rectitude of character, and his conscientious devotion to his profession.

As there has been some discussion as to vacancy being filled so promptly after Mr. Cameron's death, and so, as has been alleged, not giving a number of the Benchers special notice of such important business so that they might be present, it would be well to quote the language of No. 14 of the Rules of the Law Society, which provides that:—

"In case of a vacancy in the office of the Treasurer, or of the Treasurer elect, before entering upon the duties of the office, the Benchers present at the first meeting of Convocation next ensuing the occurrence of such vacancy shall, before proceeding to any other business, elect a Benchers to fill the office of Treasurer until the next statutory election."

Provision is made by Rule 12 for the case of the absence of the Treasurer, by the appointment of a temporary Chairman, but this does not apply to a vacancy in the office. It might have been more satisfactory (and would we are sure have been so to the newly elected Treasurer) if these rules had been a little more elastic, or framed with a little more thought as to possible contingencies, so as to have given more time for discussion as to the successor of one whose brilliant administration must make the office more difficult to any person who might follow

LAW SOCIETY—BENCH AND BAR.

him; but the gentleman who now occupies the position may rest assured that he enters upon the duties of his responsible office with the best wishes of his brethren, who accept his election in the belief that an excellent appointment has been made, and that he will fulfil his duties with that conscientious attention and honesty of purpose, which, with his undoubted learning, has gone so far to establish his reputation at the Bar.

CALLS TO THE BAR.

The following gentlemen were called to the Bar this Term:

H. H. Ardagh, J. S. Fraser, (without oral, for merit).

E. P. Clement, H. H. Culver, D. W. Clendennan, J. W. Liddell, J. W. Nesbitt, A. C. Galt, Harry Symons, Albert Ogden, J. L. Whiteside, F. W. Casey, C. L. Ferguson, F. S. Nugent, T. E. Lawson, R. Harcourt, G. A. Cooke, (without oral as being attorney), J. C. Patterson, J. Judd.

ATTORNEYS ADMITTED.

The following is the list of those admitted this Term to practice as attorneys:

John L. Whiting, John Crerar, (without oral, for merit).

A. C. Galt, F. W. Patterson, W. H. Culver, E. F. B. Johnston, C. H. Woodward, C. L. Ferguson, J. L. Whiteside, C. S. Jones, E. Mahon, T. M. Daly, F. S. Nugent, J. J. Creighton, H. A. E. Kent, R. J. Duggan, J. C. Patterson, and R. E. Wood, (who passed his examination last Term).

BENCH AND BAR.

It has been our unpleasant duty, on several occasions, to call attention to the objectionable practice, indulged in by certain newspapers, of discussing cases pending in the courts, and to the freedom with which improper motives are attributed to honourable and upright judges in giving the judgments which

the justice of the case before them seemed, in their opinion, to require. We have never denied the right of the press, and when we thought the occasion offered have acted accordingly, to discuss freely a judgment upon its merits as a matter of abstract argument, though even this has, as far as the lay press is concerned, its dangers. But when this freedom is abused, and abused to the extent that has been seen of late, it is time that some steps should be taken not only to protect the judges from such cowardly attacks, but to repress an evil fraught with the most serious consequences to the welfare of the State. We have had lately an avalanche of libels on the Bench, most of them arising out of bitterness engendered by party politics. But the last case that has come under our notice was subject to no incident of that nature, and was of an especially aggravated character, in that the offender was, and still is, unfortunately, a practising barrister and solicitor.

The offence in the case we are about to allude to, and of which a correspondent speaks in a letter which we publish in another place, is of a twofold character. In the first place there was conduct fraudulent in itself, and there was also a most unjustifiable attack on one of the judges of the Court of Chancery. It is with the first of these two offences, and other matters incident thereto, that we propose now specially to deal.

In the suit of Dr. Pringle against Henry Sandfield Macdonald, a bill was filed to compel the defendant to re-convey to the plaintiff a piece of land in the town of Cornwall; and it was alleged that the defendant had obtained from the plaintiff a conveyance of the land by fraud and deceit. It appeared in evidence that an agreement was entered into between the parties for the sale and purchase of the west three-quarters of the north half of a lot in the town of Cornwall, which agree-

BENCH AND BAR.

ment was embodied in the following correspondence :

"Cornwall, Nov. 12th, 1874.

"DR. PRINGLE, CORNWALL :

"DEAR SIR,—I offer you one thousand dollars for three-quarters of the *north half* lot number twenty-one on the south side of Second Street, in this town—the three-quarters to be measured off the west side of the lot ; the depth of the property to be, at least, one hundred and thirty-two feet. [Here follow the terms of payment, which were not disputed.] Yours truly,

"(Signed) H. SANDFIELD MACDONALD."

"To H. S. MACDONALD,

"Cornwall :

"In consideration of the terms expressed in the foregoing letter, I hereby accept your offer for the property above mentioned, and upon the conditions you state above.

"(Signed) GEORGE PRINGLE,

"Cornwall, 12th November, 1874."

The words in italics were interlined, as sworn by the plaintiff, by the defendant himself, at the plaintiff's request, to prevent any mistake, the defendant at the timesaying it was unnecessary to do this, as the measurement showed that the bargain was only as to the north half of the lot. The deed which was supposed to carry the above agreement into effect was prepared by the defendant, but was a conveyance not of the west three-quarters of the *north half* but the west three-quarters of the *whole lot*, the words describing the depth as one hundred and thirty-two feet being omitted, as well as the words "*north half*." The defendant, in his examination, at first expressed a doubt whether the words *north half*, interlined in the letter signed by defendant, were in his handwriting, but on being pressed, asserted that they were not.

The case was tried before Mr. Vice-Chancellor Blake, whose judgment was substantially as follows :

"I find but one question to be answered. Was there a binding agreement between the parties for the sale and purchase of the west three-quarters of the north half of lot number

twenty-one on the south side of the street ? To determine this, it is necessary to decide the question—Is the copy of the agreement produced by the plaintiff, with the words '*north half*' interlined, in the same state that it was when it was handed by the defendant to the plaintiff ? Can it be found, from the evidence adduced, that the plaintiff was so utterly dishonest as to alter it ? Certainly not. He appears to have acted throughout as an honest man should. If the north half was not intended, why was the depth, one hundred and thirty-two feet, inserted ? If the defendant bought the whole lot, these words or figures could not give him an inch more. The depth was inserted in the agreement because the north half was intended. From the time of the first conversation with French down to the completion of the purchase, the defendant knew, and knew right well, that such was the understanding. He, in person, measured the land to that depth, and with his own hands planted a stake to mark the extent of his purchase. There was no room for misapprehension on his part; he measured and marked it. If I am forced to conjecture between the two, I would certainly rather say that the defendant had forgotten that he had interlined the words '*north half*,' than that the plaintiff could be guilty of an almost criminal act in inserting them. To a certain extent the charge of fraud was laid against the defendant. As to the proof of fraud, the defendant's action spoke more loudly than words. Even taking the defendant's own copy of the agreement, there was a discrepancy between it and the deed, inasmuch as the '*one hundred and thirty-two feet*' contained in the former, were entirely omitted from the latter. The defendant knew that all the lots in the neighbourhood were two hundred and sixty-four feet deep, and therefore must have known that he was bargaining for a part of the north half only, and it would have been objectless inserting the words '*at least one hundred and thirty-two feet*' if it was intended to refer to the whole lot. It was clearly the duty of the defendant, who was a solicitor of this court, to draw the attention of the plaintiff to this change, but he had not done so. L. R. 5 E. & I. Ap. 64. As to the exceptions taken to the plaintiff's pleadings, there is nothing in them. I am clearly of opinion that the plaintiff has proved the allegations of the bill, and will grant a decree ordering the defendant to reform the deed, by re-conveying the portion of land to which he was not entitled, and that the defendant pay the plaintiff his costs in the suit."

BENCH AND BAR.

The defendant is the editor and proprietor of a newspaper published in the town of Cornwall, which, in the same issue that gives a report of the trial of the case, makes the following editorial comment:

"Several years ago a series of editorials, levelled at the Chancery ring, appeared in the *Toronto Daily Telegraph*, and created then some sensation. Mr. Blake—now V. C.—came in for no small share of the criticisms, which, from all accounts, he did not appreciate. In delivering his judgment in *Pringle v. Macdonald*, is it probable that there was a lively recollection of one of the reputed authors of those editorials!"

It appears that at the time spoken of in the above paragraph the defendant in *Pringle v. Macdonald* was a student in the office of the firm of which the present Vice-Chancellor was a member. We pass by for the present the questionable propriety of a student discussing in the public papers the professional conduct or standing of his master for the time being; but for the latter to assert, and expect people to believe, that the adverse judgment in the case recently tried at Cornwall was the result of spite, would almost go to prove that the defendant is as devoid of sense as he is of decency. We are not even driven to take the judgment of the Vice-Chancellor, though no judge on the Bench is more competent to form an accurate opinion on a question of fact than Mr. Blake, for the evidence given in the local papers is amply sufficient to warrant the finding.

Under a recent statute, 39 Vict. cap. 31, sec. 1, the Law Society may make all necessary rules and regulations relating to the "interior discipline and honour of the members of the Bar." The Benchers had probably power, without that Act, to purge the profession of objectionable members. They have never, we make bold to assert, been fully alive to the duty they owe to their brethren in such matters; and we go further, and say that the judges

themselves are not free from blame in allowing this evil to go so far. It is time to call things by their right names, and to apply a sharp remedy to a dangerous and insidious disease. Men who bring discredit upon their order, should be made an example of, for otherwise their brethren cannot complain if the public speak of all in the same category.

The case already spoken of is, unfortunately, not the only case of the kind. In *Gilleland v. Wadsworth*, 23 Grant, 547, the Chancellor ordered a rule to issue, calling on another solicitor, there referred to, to show cause why he should not be struck off the rolls for malfeasance; and we might here inquire if the Society propose to take any action as to the conduct of another barrister, once also a solicitor, now awaiting sentence for having obtained money under false pretences.

It is all very well to say that men who could be guilty of such conduct as we have alluded to are beneath contempt and that it is not worth while taking any action. If a limb mortifies it is worth while to cut it off, and it is worth while to let the public know, in the most decided manner, that we will not allow those who have been proved guilty of such things to remain members of a body which for complete usefulness ought to be, and which boasts that it is, like *Cæsar's wife*, above suspicion.

In England the Incorporated Law Society deals, we understand, with matters affecting the honour of the profession. There ought to be in this country a committee of the Benchers to enquire into all cases of this sort which might come under their notice. It should be their duty to do it, and they should be responsible for its being done. Until some step of this kind is taken we are not likely to see much effect given to the recent statute, and one of the supposed advantages of Convocation will be a dead letter.

FORECLOSURE DECREES AND PERSONAL ORDERS.

FORECLOSURE DECREES AND
PERSONAL ORDERS.

SOME doubt exists in the minds of the profession at present as to the rights of mortgagees to the double remedy in the Court of Chancery which the Administration of Justice Act of 1873, sec. 32, was designed to afford. When a decree for sale is prayed no difficulty is felt, we believe; but when a foreclosure is prayed, it is said the mortgagee's rights are more restricted.

The point came up recently before Vice-Chancellor Blake in a case of *Armour v. Usborne*. In that case the bill prayed for a personal order for payment against the defendant, and also a decree for foreclosure. It, however, appeared by the statement of counsel that the office copy of the bill served on the defendant had been endorsed with an endorsement, notifying the defendant that, in default of answer or note disputing claim, &c., a decree for foreclosure might be drawn up; this endorsement made no reference to the application intended to be made for the personal order, so that the defendant, looking at the bill, saw that a personal order and foreclosure was asked; but looking at a notice which the practice of the Court did not render necessary, but which the plaintiff served on the defendant, he perceived that the plaintiff only demanded foreclosure. The defendant allowed the bill to go *pro con*. The Vice-Chancellor considered that as the special endorsement had been unnecessarily made, it would have the effect of misleading the defendant, and therefore refused to grant the plaintiff any other relief than the simple decree for foreclosure.

In a previous case of *Crickmore v. Dow* the question of special endorsement did not arise, and in that case an order for payment was made, together with a decree for foreclosure, but the decree was so

worded that the remedy on the personal order was to be first exhausted or abandoned before recourse could be had to the foreclosure proceedings.

In this case the Court gave the plaintiff the remedy by action, and also a decree for foreclosure, but at the same time virtually stayed the proceedings for foreclosure until after the plaintiff should have proceeded, as far as he wished, to enforce the personal remedy on the covenant.

We are not aware what special circumstances there were in this case which called for this mode of framing the decree, though doubtless there were such. But to prevent any misconception it would be well to consider the subject in the abstract. We do not think it could have been intended by this decision to specify a form of decree of general application, one which would not, as it seems to us, give the two remedies in the one suit which the Administration of Justice Act intended. And it may be argued in this way:—The nature of the relief which a plaintiff is now entitled to claim in a mortgage suit must obviously be governed by the relief which he could have got by his action or actions at law and suit in equity before the Administration of Justice Act; and no principle, we think, was more clearly established than this, viz., that a mortgagee at any time before, and up to obtaining the final order of foreclosure, and even after final order, as long as he retained the mortgaged estate, was at liberty to enforce all the remedies he might be entitled to at law and in equity concurrently. The Court of Chancery over and over again has refused to stay an action at law on the covenant or in ejectment because a suit in equity had been brought for foreclosure. As early as 1780, Lord Mansfield held that a mortgagee having a bond securing the mortgage debt, might bring an action on the bond and arrest the debtor pending a suit in equity for foreclo-

FORECLOSURE DECREES AND PERSONAL ORDERS—LOCAL MASTERS IN CHANCERY.

sure, and an application to stay the action at law was refused, Lord Mansfield saying that it had been settled over and over again, that a person in such a case is at liberty to pursue all his remedies *at once*. The rule then laid down in a court of law has since been repeatedly re-affirmed in courts of equity. It is only necessary to refer to two cases: *Lockhart v. Hardy*, 9 Beav. 349; and *Cockell v. Taylor*, 16 Beav. 159. In the latter case the Master of the Rolls says, speaking of the rights of the mortgagee: "He may at the *same time* take possession of the estate, sue the mortgagor on his covenant, and proceed to foreclose." In the former case he said: "A mortgagee may pursue all his remedies at the *same time*. If he obtains full payment by suing on his bond he prevents a foreclosure; if only part payment is obtained, he must account for what he has received, and may foreclose for the residue. If a mortgagee obtains a foreclosure first, and alleges that the value of the estate is insufficient to pay what is due to him, he is not precluded from suing on the bond; but if he thinks fit to do so, he must give the mortgagor a new right to redeem, notwithstanding the foreclosure, and the mortgagor may file a bill to redeem." What he said on the argument he repeated after taking time to consider.

The only disadvantage which a mortgagee incurred by thus pursuing all his remedies at the same time was this, that the Court would not make the payment of the costs at law a condition of redemption, as a matter of course, but required the plaintiff to show some special reason for seeking the two remedies (see *Ord.* 465), and the necessity of retaking the account, of having a new day appointed, or serving a notice when anything on account had been realized.

But to compel the plaintiff to suspend his proceedings for foreclosure, in other words, to stay the time for redemption

from running so long as he may be endeavoring to enforce the personal remedies on the covenant, would not, it appears to us, be granting the plaintiff the same remedy he would have been entitled to before the Administration of Justice Act, but something less, and not so extensive. If, before a final order is obtained, he have received any part of his debt, he must give credit for it; if he have received the whole, he is prevented from getting his final order; and if after final order he still pursues his remedy on the covenant, as he has a perfect right to do, so long as he retains the mortgaged estate, he thereby opens the foreclosure, and the mortgagor becomes entitled to a new day to redeem. By analogy to the former practice, the extra costs occasioned by the mortgagee enforcing his remedy on the covenant and by ejectment, we are inclined to think, should not be allowed as a matter of course, as a condition of redemption.

The practice as it now stands can hardly be said to be settled, and there is a prospect, we hear, that the question will be carried before the full Court, when it is to be hoped the point may be discussed free from any technical difficulty such as arose in *Armour v. Usborne*, to which we have referred.

LOCAL MASTERS IN CHANCERY.

The Local Masters and Deputy Registrars of the Court of Chancery have recently been coming in for a full measure of discussion, not altogether complimentary, at the hands of writers in the public press.

We are not prepared to say that they are in all respects perfection, but we do say that they have been subjected to much unjust criticism, and that in their case the exception has been made to take the place of the rule. As these officers cannot themselves reply to attacks, too often made by those who live entirely in

LOCAL MASTERS IN CHANCERY.

the past and think that what has been still is, or possibly sometimes by disappointed solicitors, we venture to say a few words in their defence. The attacks on the Masters, moreover, are an indirect censure on the Judges of the Court of Chancery, to which they are certainly not open.

In some of the smaller towns it is not so easy to induce a practitioner with a good Chancery business to give it up for the lesser emoluments arising from master's fees, and the Judges of the Court have to make the best selection which the material at hand supplies. The Judges are not blind to the requirements of business, nor are they insensible to the necessity of having the best men they can get for these responsible situations. They are, moreover, entitled to great credit for their exertions in introducing from time to time more speedy and satisfactory modes of conducting business into a Court, the name of which had become a by-word of contempt and dislike.

Changes have been made in the personnel of the Local Masters as occasion offered, and though there may yet be three or four who might be replaced with advantage, and who will, doubtless, eventually give place to better men like others have done, it is highly unjust to speak of the whole in the general terms of reproach that have been used in some of the letters referred to.

A very little consideration of the subjoined list will shew that, as a body, the Local Masters must possess the confidence of their brethren. Twelve out of the thirty-six are County Court Judges, whilst it would be a difficult matter to find better men than those who hold office in all the larger centres of business such as London, Kingston, Hamilton, &c., and Ottawa, Peterboro' and Lindsay (where there is a choice); and most of the other towns in the same way. There is no doubt that so far as possible, County

Judges should be selected, and that has evidently not escaped the attention of the Judges of the Court of Chancery, as recent appointments point in that direction. The payment of Local Masters by fees is an undoubted evil. So far as possible, County Judges should be selected and they should be properly paid. A salary commensurate with the work they now do, and with what would be required of them as Local Masters, would hurt no one, and would be an inducement to the best men to accept positions which at present do not command the best talent at the Bar. The following is the present list of Local Masters:

Algoma—Judge McCrae,
 Barrie—James R. Cotter.
 Belleville—Samuel S. Lazier.
 Berlin—Anthony Lacourse, Junior Judge.
 Brampton—Judge Scott.
 Brantford—Judge Jones.
 Brockville—J. D. Buell.
 Cayuga—Judge Stevenson.
 Chatham—Robert O'Hara.
 Cobourg—Wm. H. Weller.
 Cornwall—J. F. Pringle, Junior Judge.
 Goderich—Henry McDermott.
 Guelph—J. Watson Hall.
 Hamilton.—Miles O'Reilly, Q.C.
 Kingston—Jas. A. Henderson, Q.C.
 Lindsay—Wm. H. Weller, and Judge
 Dean, (Concurrent).
 London—Jas. Shanly.
 L'Orignal—Judge Daniell.
 Milton—Judge Miller.
 Napanee—Samuel S. Lazier.
 Ottawa—W. M. Matheson, and Robt.
 Cassels, Jr., (Concurrent).
 Owen Sound—Jas. Masson.
 Picton—Samuel S. Lazier.
 Pembroke—Thos. Deacon.
 Perth—Judge Senkler.
 Peterborough—Wm. H. Weller, and Chas.
 A. Weller, (Concurrent).
 Sandwich—Samuel S. Macdonell.
 *Sarnia—Peter T. Pousett.
 Simcoe—C. C. Rapelge.

CHANGES IN THE ENGLISH BENCH.

St. Catharines—F. W. McDonald.
 St. Thomas—Jas. Shanly.
 Stratford—Judge Lizars.
 Walkerton—W. A. McLean.
 Woodstock—H. B. Beard.
 Whitby—G. M. Dartnell, Junior Judge.

CHANGES IN THE ENGLISH BENCH.

The vacancies caused by the elevation of Lord Blackburn to the Court of Appeal, and the death of Mr. Justice Quain and Mr. Justice Archibald, have been filled by the appointment of Mr. Manisty, Q.C., Mr. Hawkins, Q.C., and Mr. Lopez, Q.C. Mr. Hawkins is well known as a Counsel, and it was thought that he had finally declined promotion. He will be a great acquisition to the bench; though he is making a large personal sacrifice in giving up his immense practice at the bar. The *Law Times* says that the appointment of Mr. Lopez "is colourless from a professional point of view." The *Law Journal*, in speaking of the appointment of Mr. Hawkins, says:—

"Mr. Henry Hawkins, Q.C., who has now been elevated to the bench, is the son of Mr. J. H. Hawkins, the well-known and much-esteemed solicitor of Hitchin, in Hertfordshire. Mr. H. Hawkins was called to the bar at the Middle Temple in 1843, and was a member of the Home Circuit. He became Queen's counsel in 1858. Mr. Hawkins enjoyed one of the most lucrative practices at the bar ever known, his business in compensation cases having been very large and very remunerative. In the general conduct of a case and in cross-examination he stood unsurpassed, while his addresses to the jury were famous for their lucidity. Probably no counsel ever possessed a greater capacity for interesting and amusing jurymen, and for putting them on excellent terms with themselves and with things in general. 'The audience' in Courts of Law—by which we mean the idle people who lounge about Courts to pass away the time—will deplore the loss of Mr. Hawkins, who, in nine cases out of ten, succeeded in giving them a much greater treat than they were ever likely to get at a play. It would,

however, be unjust to suppose that Mr. Hawkins relied on these arts for his success. On the contrary, he has always shown himself to be a man of a very high degree of talent, with plenty of decision and force, a good knowledge of law, industry, energy, and a thorough acquaintance with mankind, and the affairs of life in all its aspects, civil, social, and mercantile. We believe that he will be a capital judge, and that he will thoroughly justify the anticipations generally formed concerning him."

The following extract from the same journal, remarks in the following language upon the changes which have been wrought in modern times in relation to the bench, by the increase of business, the altered organization of the Courts, and the spirit of the present age:—

"In the present day judgeships are not sought after with that keenness which for centuries characterized the ambition of lawyers. The emoluments of a really first-rate practice at the bar are just about double the amount of the salary of a judge of the High Court; while the office of judge, instead of presenting as heretofore some prospect of comparative repose, menaces its occupant with labours of the most arduous kind. The work has become more continuous, more varied, more difficult. Each judge has to rely far more on his own energy, learning, and legal acumen. The complications of modern commerce, aggravated by the use of postal and telegraphic communications, augment the number of facts in each case, and, therefore, the points of law involved. There is also, the personal annoyance necessarily attendant upon an office which compels the holder to be in ignorance, from day to day, of what he has to do, and where he is to be; and which brings him into unfortunate collision with a host of suitors, solicitors, and counsel justly agrieved by the disorder into which proceedings are now thrown. The dignity of the judicial position must in former times have also proved a strong attraction. But the spirit of our times takes not such note of rank. The civil position of a judge is, therefore, probably not so exalted as it formerly was. Moreover, this is an age of independence, and an age, also, in which health is studiously regarded; and there can be no doubt that a barrister can secure independence and health to a degree not attainable by a judge. The judges of our bench still occupy a position, in the eyes of the nation, far above the

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judges of the Continental and American Courts. But the relative advantages in this country of bench and bar are no longer to be regarded as decidedly in favor of the former."

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ONTARIO.

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LEPROHON V. CITY OF OTTAWA.

Taxation—Jurisdiction of Local Legislatures—Salaries of officers of House of Commons.

Held, That the Local Legislatures have not power to impose a tax upon the salaries of officers of the House of Commons.

[Q.B. Ottawa, Oct. 27, 1876—Moss, J.]

This was an action of trespass, brought to try the right of the Corporation, under its by-laws, to tax the salaries of the officers of the Dominion Government and of the two houses of Parliament, resident at Ottawa. The facts were admitted. The case was submitted to Mr. Justice Moss, the presiding Judge at the Ottawa Assizes on the 27th October last, for his ruling on the points of law involved.

Cockburn, Q.C. for plaintiff.

O'Gara for defendant.

Moss, J.—As the learned counsel candidly informed me at the outset, this is a test case, and it is intended to ultimately obtain an expression of opinion from the Supreme Court of the Dominion upon the question involved. My own individual opinion, therefore, is a matter of little importance, and I might, without any impropriety, have contented myself with entering a verdict *pro forma*. As I am desired to express an opinion I shall endeavour to do so before entering a verdict, in accordance with the view I have been compelled to take of the law.

This case is one of considerable difficulty, and the time and opportunities I have had to investigate the subject, have been wholly inadequate to that full consideration which it must ultimately receive, and I have made no attempt to reduce it to writing. I have endeavoured, however, to form an opinion upon the various points submitted to me by the learned counsel in the course of their able argument.

The question which it seems convenient first to consider is: Whether upon the proper construction of the Assessment Acts of Ontario the income of an officer of the House of Commons is liable to taxation. On behalf of the plaintiff

in this case, who is an officer of the House of Commons and whose salary is payable in the manner stated in the special case, it was argued that upon the true construction of the Assessment Acts, the Legislature of Ontario, so far from imposing any charge upon the income of such an official, had declared it to be exempt. With this contention I am not able to agree. By the Act of 1866, which was in force at the time the British North America Act was passed and Confederation established, the salaries of officials in the position of the plaintiff were exempt; and in the Ontario statute of 1869, relating to the assessment of property, that exemption was continued, the language of the Statute being only varied from that of 1866 so far as the changed circumstances of our political condition rendered necessary. By the Act of 1869 it was clear that these official salaries were not subject to taxation. Sub-section 25 of section 9 expressly includes, among the exemption from liability to taxation, the annual official salaries of the officers and servants of the House of Commons resident at the seat of Government at Ottawa. The plaintiff is a servant of the House of Commons resident at the seat of Government at Ottawa, and therefore if that clause had continued in force he would have been exempt by the express enactment of the Legislature. But that act was repealed by the act of 1871, and therefore, in the existing statute law of the Province there is no express exemption of the salary of a person occupying the position of plaintiff.

But it was argued that an exemption was constructively contained in sub-section 12 of the same section which exempts any pension, salary, or gratuity or stipend, perived from Her Majesty's Imperial Treasury, or elsewhere out of this Province. The contention of the plaintiff was that this was a salary derived out of this Province. I do not think that exemption extends to the present case. The course of legislation seems to me to be quite opposed to this construction being placed upon sub-section 12. That sub-section is to be found in the acts of 1866-9, and contains precisely the same words "or elsewhere out of this Province." Notwithstanding the use of these words, the Legislature, when it desired to manifest its intention of exempting such salaries, deemed it necessary to use express language. This seems equivalent to a legislative declaration that the words in the 12th sub-section did not cover the case. If they did the express exemption in the 25th sub-section was wholly unnecessary. It may be said that this was done for greater precaution. But, even if that explanation was otherwise unsatisfactory,

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what is to be said of the repeal of sub-section 25 by the Act of 1871. It cannot admit of serious doubt. I think that the intention of the legislature in repealing the Act was to remove these official salaries from the list of exemptions. On the whole I think that upon the construction of the Ontario Assessment Acts the Legislature of Ontario have not exempted the incomes of officers of the House of Commons from liability to assessment.

The grave question then arises, whether the Provincial Legislature had power to impose a tax upon the salaries of such officers. I need not say that I approach the solution of this question with very grave doubt and very great hesitation. It is a constitutional question involving delicate considerations and affecting very considerable interests. The best conclusion which I have been able to form is, that upon the construction of the powers which are vested in the Legislature of Ontario, the officers in the position of the plaintiff are not liable to be assessed upon their incomes. I look first, as I am bound to look, at the language of the British North America Act. Upon the terms of this statute the defendants relied for finding the power to impose a tax upon these incomes. The 2nd, 8th and 13th sub-section of the 92nd section are the clauses upon which the defendants mainly rely. The object of the 92nd section was to define the matters with which the Provincial Legislature should alone have the power to deal and to describe the subjects which should be withdrawn from the legislative control of the Dominion Parliament. The second sub-section gives the legislature of each province power to legislate in relation to direct taxation in the Province, in order to the raising of the revenue for Provincial purposes. I am of opinion that the assessment in question cannot be said to be a matter of direct taxation in order to the raising of a revenue for Provincial purposes. It is an assessment levied for raising moneys for municipal purposes. Then the Legislature of each Province has also power, by the 8th sub-section, to make laws relating exclusively to matters coming within the class of municipal institutions in the Province. Now, no doubt under this sub-section it belongs to the Provincial Legislature to determine generally the mode of assessment for municipal purposes and on what property taxation should be levied. The power to authorize the mode of assessment and levy of taxes for municipal purposes, it may be conceded, is implicitly contained in the power to legislate generally with respect to municipal institutions. But the extent and limits of this

power are not expressly stated. It arises my implication and necessary contentment, not by express enactment. I do not think that that section of itself contains any express authority to levy such a tax as that in question. The 13th sub-section which gives the exclusive legislative jurisdiction over property, and civil rights does not appear to me to be applicable.

On the whole, I do not find in the British North America Act that there is an express provision, either authorizing or prohibiting any tax on such incomes. That being the case, there being no express provision, and the instrument which forms the great charter of our constitution being silent on the subject, it appears to me that the Court will have to consider the question in relation to the Federal character of the Dominion.

The question has been frequently considered in that respect in the United States. Numerous decisions of the Supreme Court and of the State Courts were referred to by the learned counsel during the argument. Now, it is quite true as suggested in the argument, that these decisions are not binding upon the humblest judge of this Province, but they are the opinions of eminent jurists, distinguished for learning and deeply versed in the solution of questions of constitutional law. I think, therefore, that their reasoning will probably be found to furnish us with a safe guide in the determination of these questions. This reasoning seems to me cogent and conclusive. It is so entirely applicable to the case in hand that I could not come to any other conclusion than that I have indicated without being prepared to impugn its correctness. I have said that I find no express provision in the British North America Act either authorizing or prohibiting this assessment. Now the Courts of the United States have proceeded directly upon the assumption that there is no express provision which regulates this subject. They do not proceed upon the construction of any particular language in the constitution, but they place their decisions upon the foundation of broad and general principles. They rest them upon the character of the essential relations existing between the Federal Government and the State Governments, and upon the estimate of the powers which must be vested in or removed from each respectively. Now, in the great case of *McCulloch v. Maryland*, 4 Wheaton, in which that eminent jurist Chief Justice Marshall pronounced judgment, he laid down the principle that the States have no power of taxation or otherwise to retard, impede, burden or restrain in any way the powers vested

in the general Government. That was the general doctrine upon which the judgment of the Court proceeded in that important case. The learned Chief Justice very fully considered the nature of the relations which subsisted between the Central and the States Government, and held that it would be contrary to the character of the Federal Union to permit State legislation of a character that would impair in any way the effective execution of the general powers which had been entrusted to the central authority. In that case it was unnecessary to consider pointedly the power to tax officers of the United States upon their income, but the principles that were laid down were quite enough, in my opinion, to extend to such a case. In subsequent cases they were held so to extend. In the case of *Dobbins v. Commissioners of Erie County*, 16 Peters, to which I was also referred by Mr. Cockburn, the question was raised expressly. There the Supreme Court of Pennsylvania held that a law was constitutional by which the State had assumed to tax an officer of the United States. The question, therefore, was raised directly and pointedly before the Supreme Court. It was held that upon the reasoning of the case in 4 Wheaton, and upon the legitimate extension of its principles such a law was constitutional. I cannot do better than refer to the language which was used by the learned Judge who pronounced the unanimous opinion of the Court in that case. After pointing out the inanimate objects, the use of which the constitution contemplated, and the management of which had been entrusted to the central authority, such as ships-of-war which were the means of carrying out the object of the Central Government and could not be taxed by the State, he proceeded: "Is not the officer more so who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be used by a State as compensation, will not Congress have to graduate its amount, with reference to its reduction by the tax. Could Congress use an uncontrollable discretion, in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power, by way of compensation to officers can in no way be subordinate to the action of the State Legislatures on the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes of the States would be different."

Now, the reasoning employed in that case is precisely applicable to that on which I am giv-

ing my opinion. Without expressing dissent to these views, and without, so to speak, overruling the case, I could not come to any other conclusion. Our circumstances, it appears to me, sufficiently resemble the circumstances that existed in these cases to render the principles entirely applicable. There is but one other case to which I shall refer, *Buffington v. Way*, 4 Law Times, U. S. Supreme Court Reports. In that case Mr. Justice Nelson said:

"It is conceded in the case of *McCulloch v. Maryland*, that the power of taxation by the States was not abridged by the grant of a similar power to the Government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two Governments, and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the General Government; but it was held, and we agree properly held, to be prohibited by necessary implication, otherwise the States might impose taxation to an extent that would impair, if not wholly defeat the operations of the Federal authorities when acting in their appropriate sphere. These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins v. Commissioners of Erie*, which determined that the States were prohibited upon a proper construction of the constitution, from taxing the salary or emoluments of an officer of the Government of the United States, and we shall now proceed to show that upon the same construction of that instrument, and for other reasons, the Government is prohibited from taxing the salary of the judicial officers of the State. It is a familiar rule of construction of the Constitution of the Union, that the Sovereign power vested in the State Government by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the Government of the United States."

In this case the Central authority, in the exercise of its appropriate functions, appointed the plaintiff to a position of emolument. In the exercise of its proper powers it assigned to him a certain emolument. This emolument the plaintiff is entitled to receive for the discharge of duties for which the Central Government is bound to provide. I do not find in the British North America Act that there is any express constitutional prohibition against the Local Legislatures taxing such a salary, but I think that upon the principle thus summarized in the case which I am now citing, there is necessarily an implication that such power is not vested in the

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Local Legislature. I therefore, in accordance with these views which I have just imperfectly expressed, have thought it right to enter a verdict for the plaintiff, and I think he should have a certificate to entitle him to full costs.

Verdict for plaintiff.

DIGEST.

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FOR MAY, JUNE, AND JULY, 1876.

From the American Law Review.

ACCOUNT.—See EVIDENCE; PARTNERSHIP;
SOLICITOR AND CLIENT.

ACTION.—See EVIDENCE; HUSBAND AND WIFE.

AGENCY.—See BILLS AND NOTES; LIEN, 2;
NEGLIGENCE, 2.

AGREEMENT.—See CONTRACT.

ALTERATION OF CONTRACT.—See CONTRACT.

ALTERATION OF INSTRUMENTS.—See CHECK.

ANSWER.—See PLEADING.

APPROPRIATION OF PAYMENTS.—See BILLS AND
NOTES.

ASSAULT.—See HUSBAND AND WIFE.

AVERAGE.—See LIEN, 2.

BANK.—See CHECK.

BANKRUPTCY.

1. The Divorce Court ordered M. to pay £5,000 to O. on the latter's undertaking to pay the same into the registry, to abide the further order of the court. M. did not pay the money, and O. filed a petition for adjudication in bankruptcy against M. *Held*, that there was no good petitioning creditor's debt.—*Ex parte Muirhead. In re Muirhead*, 2 Ch. D. 22.

2. Action for breach of an agreement, whereby the defendants agreed, in consideration of the plaintiff transferring and disclosing to them all his property upon trust for all the plaintiff's creditors, to repay to the plaintiff £50 upon realization of the plaintiff's property. *Held*, that said agreement was void, being a fraud upon the plaintiff's creditors.—*Blacklock v. Dobie*, 1 C.P.D. 265.

3. A partner in a firm died; and by the partnership articles, his share was to be paid out by instalments extending over a period of fourteen years. Before they were paid, the firm became bankrupt. *Held*, that the amount due the estate of the deceased partner could not be proved in bankruptcy against the firm.—*Nelson v. Gordon*, 1 App. Cas. 195.

See FRAUDULENT TRANSFER; SURETY.

BEQUEST.—See CY-PRES; DEVISE; ELECTION;
LEGACY; MARRIAGE, RESTRAINT OF.

BILL IN EQUITY.

A bill of discovery to obtain inspection of documents in the defendant's possession cannot be maintained in England if in aid of proceedings about to be taken for the recovery of land in India.—*Reiner v. Marquis of Salisbury*, 2 Ch. D. 378.

BILL OF LADING.—See BILLS AND NOTES.

BILLS AND NOTES.

A. in England employed B. in South America to purchase goods for him. The course of business was as follows: B. raised funds to purchase goods by drawing bills on A. and selling them; B. with the proceeds purchased goods and shipped them to Liverpool, and sent the bills of lading and invoices of the goods by post direct to A.; in his accounts, B. credited A. with the bills, and charged him with the cost of the goods and with commission; and in his letters he directed A. to place the price of the goods to his credit, and the bills to his debit. Both A. and B. became bankrupt. At the time A. became bankrupt, goods were in transit to Liverpool; and some of the bills out of the proceeds of which the goods had been bought had been accepted, and others were presented to A. after his bankruptcy and not accepted. The goods arrived, and were taken possession of by A.'s trustee in bankruptcy. The holders of the bills claimed to have the proceeds of the goods appropriated to the payment of the accepted and also of the unaccepted bills. *Held*, that holders of the bills had no right to have the proceeds of said goods specifically appropriated to their bills. The property in the goods passed to A., subject to B.'s right of stoppage *in transitu*; it did not revert in B. on A.'s failure to accept some of said bills; and there was no evidence of an agreement by virtue of which B. had a charge upon the goods in the hands of A., and a right to have them applied in taking up the bills.—*Ex parte Banner. In re Tappenbeck*, 2 Ch. D. 278.

See BOND; CHECK.

BOND.

A New York company sold its bonds there, and parted with its interest in them, and control over them. The bonds on which the name of the payee was left blank were then sent to England, and there advertised and sold by the New York purchaser's agents. *Held*, that the bonds were "issued" in England.—*Grenfell v. Commissioners of Inland Revenue*, 1 Ex. D. 242.

See SURETY.

CARRIER.

By statute, a common carrier is not liable for injury to pictures which shall have been delivered either to be carried for hire, or to accompany the person of any passenger, when the value of the pictures exceeds £10, unless the pictures are declared and an increased charge made. It was *held* that the common carriers are protected by this statute, although the injury occurred after the pictures

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had been negligently taken by them beyond the point of destination.—*Morrit v. North-eastern Railway Co.*, 1 Q. B. D. 302.

See SHIP.

CHARITY.—See CY-PREN.

CHARTERPARTY.

1. By charterparty a vessel was to carry a cargo of lumber from P. to M., "sixteen days to be allowed for loading at P., and to be discharged at such wharf or dock as the charterers may direct, always afloat in fourteen like days, and ten days on demurrage over and above the said lying days, at £10 per day." The ship duly began unloading at M. It was the duty of the master to put the timber over the ship and from it into rafts, and the charterer was to take it away. Bad weather came on, and the rafts could not be formed; and the charterer consequently could not take the timber away. The bad weather caused a delay of four days in discharging the ship; and the ship-owner brought this action against the charterer for four days' demurrage. *Held*, that the defendant was liable, as there was an implied contract that he would take the risk of any ordinary vicissitudes which might prevent his releasing the ship at the expiration of the lay days.—*Thüs v. Byers*, 1 Q. B. D. 224.

2. To an action against charterers for delay in loading the vessel, the defendants set up this clause in the charterparty: "This charter being concluded by the said charterers for or on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted; the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed they shall have." *Held*, that "loading excepted" extended to delay in loading, and that the defendants were therefore liable.—*Lister v. Hainsbergen*, 1 Q. B. D. 269.

See INSURANCE, 2.

ACT.

CHECK.

The defendant drew a check, payable to B. or bearer; and B. handed it to his clerk for deposit. The clerk absconded with it, and after altering its date from March 2, 1876, to March 26, 1876, passed it to the plaintiff for value. The plaintiff was not guilty of negligence. Payment of the check was stopped. *Held*, that the alteration was material, and that the check was void in the hands of the plaintiff.—*Vance v. Lowther*, 1 Ex. D. 176.

CHURCH OF ENGLAND.

1. A Wesleyan minister who had inscribed upon the tombstone of his daughter, who was buried in an English churchyard, the words "daughter of the Rev. H. K., Wesleyan Minister," was held entitled to use the word "Reverend" before his name, as it was not a title of honor or dignity belonging exclusively

to the Established Church of England.—*Keet v. Smith*, 1 P. D. 73.

2. The Rubric of the Book of Common Prayer prefixed to the Communion Service, and the 27th canon in the canons of 1603, warrant a minister of his own authority, and without any trial, in repelling a parishioner from the Holy Communion in case he is "an open and notorious evil liver," who thereby gives offence to the congregation, or "a common and notorious depraver of the Book of Common Prayer." "Evil liver" in the Rubric, according to the natural use of the words, is limited to moral conduct. The appellant printed and published a volume entitled "Selections from the Old and new Testaments," and omitted therefrom all reference to the Devil or evil spirits. At the suggestion of the vicar of his parish, the appellant wrote him a letter concerning the book, in which he said, "With regard to my book, the parts which I have omitted are, in their present generally received sense, quite incompatible with religion or decency (in my opinion). How such ideas have become connected with a book containing everything that is necessary for a man to know, I really cannot say, and can only sincerely regret it." *Held*, that the appellant was neither an open and notorious liver, nor a depraver of the Book of Common Prayer.—*Jenkins v. Cook*, 1 P. D. 380; s. c. L. R. 4 Ad. and Ec. 46.

CLASS.—See DEVISE, 2.

COLLISION.

A steamer ran into the barge A. in endeavoring to avoid collision with the barge S., which had brought herself across the bow of the steamer by improper steering. The A. instituted a cause of damage against the S. *Held*, that the S. was liable. That the A. might, by different steering after the steamer had changed her course to avoid the S., have avoided collision, did not make her necessarily guilty of negligence.—*The Sisters*, 1 P. D. 177.

See LEX FORI.

COMMON CARRIER.—See CARRIER; SHIP.

COMMON COUNTS.—See FRAUDS, STATUTE OF.

CONDITION.—See DISTRESS; LEASE, 1; LEGACY 2; MARRIAGE, RESTRAINT OF.

CONFIRMATION OF SETTLEMENT.—See SETTLEMENT, 6.

CONSTRUCTION.—See CHARTERPARTY; CONTRACT; DEVISE; ELECTION; LEGACY; RAILWAY; SALE; SETTLEMENT, 3, 5; SURETY.

CONTINGENT REMAINDER.—See DEVISE, 2.

CONTRACT.

1. The defendant bought 100 tons of iron to be delivered at his works. Delivery, 25 tons at once, and 75 tons in July next. The first 25 tons were delivered immediately, and 50 tons more in July. On the 15th October the defendant met the plaintiffs' manager,

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and said, "You have not sent any pigs lately;" to which the manager replied, "I will send you a boat this week." The plaintiffs forwarded 25 tons addressed to the defendant, and the latter declined to receive the iron. To an action for non-acceptance of the iron pursuant to contract, the defendant pleaded that the plaintiffs were not ready and willing to deliver the iron according to contract. *Held*, that the defendant was not liable. It is laid down, that, where a vendor is shown to have withheld his order to deliver until after the agreed time in consequence of a verbal request of the vendee before the expiration of the agreed time, and where after such time the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages; but that, if the alteration of the period of delivery was made verbally at the request of the vendor before the period for delivery, the vendor could not show that he was willing and ready to deliver according to the original contract, and therefore could not recover.—*Plevins v. Downing*, 1 C. P. D. 220.

2. The plaintiff engaged to sing in an important part in a play which the defendants were about to bring out in their theatre. The first performance was to be Nov. 28; and on Nov. 23 the plaintiff was taken ill, so that it became evident that she could not perform the part on Nov. 28. Accordingly on Nov. 25 the defendants made a provisional arrangement with another person for a month, in case the plaintiff should be unable to sing on Nov. 28. The plaintiff was unable to sing until Dec. 4, on which day she offered to fill the part, but was refused. The Court *held*, that if no substitute capable of performing said part could be obtained except upon the terms that she should be permanently engaged at higher pay than the plaintiff, then it followed as a matter of law that the failure on the plaintiff's part went to the root of the contract, and discharged the defendants; and that upon the facts the defendants were discharged.—*Poussard v. Spiers*, 1 Q. B. D. 410.

3. The defendant invited offers for the execution of the works comprised in certain specifications and plans for the purpose of building a bridge across a river. It was stated that "these plans are believed to be correct; but their accuracy is not guaranteed." The plaintiff agreed to complete the work in the manner described in the specifications; and do the work according to the terms of the specifications; and the agreement contained a condition, that if the mode of doing the work was altered (as it might be by the defendant's engineer) the plaintiff should do it in the altered way; and that if in consequence he incurred expense, he should have compensation, of the amount of which said engineer was to be sole judge. According to the specifications, the foundations of the piers were to be laid by means of caissons as shown in a drawing. The plaintiff attempted to lay the piers accordingly; but after much expense, it was found impracticable to do it in the above manner, and a new method was adopted by directions of the engineer. The

plaintiff brought an action for breach of warranty that the bridge could be built according to said plans and specifications. *Held*, that there was no such warranty. *Quare*, whether the plaintiff could recover upon a *quantum meruit* for his extra work.—*Thorne v. Mayor of London*, 1 App. Cas. 121; a. c. L. R. 10 Ex. (Ex. Ch.) 112; 10 Am. Law. Rev. 107.

4. A. and B., in consideration of the services and payments to be mutually rendered, agreed that B. should be A.'s sole agent at Liverpool for the sale of his coal during the term of seven years, and should not act as agent for any person other than A.; that rates should be fixed by A., and B. should receive a commission upon his sales; and that if B. should not have sold a certain amount, and A. supplied a certain amount per year, the agreement might be determined upon giving notice thereof. After four years, A. sold his coal mine; and from that time B. ceased to be employed in the sale of the coal. *Held*, that there was no implied contract that A. would send any coal to Liverpool, or would continue for any particular length of time to send coal there; and that an action for breach of said agreement could not be maintained by B.—*Rhodes v. Forwood*, 1 App. Cas. 256.

See CHARTERPARTY; DAMAGES; FRAUDS, STATUTE OF; INSURANCE; LIEN, 2; NEGLIGENCE, 3; PARTNERSHIP; RAILWAY; SALE; TRUST, 2; VENDOR AND PURCHASER.

COVENANT.

The owner of houses numbered 38 and 40 on a street demised 40 to the plaintiff, who covenanted to repair the demised premises. Said owner had previously demised No. 38 in similar terms. Under 40 was an archway, the southerly side of which was formed by the northerly wall of house 38; and this side of the arch did not fall within the plaintiff's covenant to repair. Above the archway, the wall between 38 and 40 was used by both buildings; and this wall partially gave way, in consequence of the giving way of the wall under the archway. *Held*, that there was no implied covenant on the part of the defendant to maintain the wall under the archway, so as to support the plaintiff's premises.—*Colebeck, v. Girdlers' Co.*, 1 Q. B. D. 234.

See LEASE 1; SETTLEMENT, 5.

CY-PRES.

The doctrine of *cy-pres* disposition of charitable legacies is not necessarily inapplicable where the residuary bequest is to charity. For a discussion of the applicability of the doctrine of *cy-pres*, see *Mayor of Lyons v. Advocate-General of Bengal*, 1 App. Cas. 92.

DAMAGES.

1. The plaintiff, who was in the habit of exhibiting his goods at cattle-shows, exhibited them at B. There he contracted with the defendants for the carriage of the goods to N., where there was to be another show, delivery to be before a certain day. The goods

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did not arrive until after said day, and when the show was over. The defendants paid the plaintiff's pecuniary travelling expenses; but the plaintiff demanded compensation for loss of time and profits. It was found that the defendants had notice of the purpose for which the goods were sent. *Held*, that the plaintiff was entitled to damages for loss of profits, as such loss was the natural consequence of the failure of the object for which the goods were sent.—*Simpson v. London & North-western Railway Co.*, 1 Q. B. D. 274.

2. The defendant made his living by collecting messages, and transmitting them by telegraph to America and other places. He received from the plaintiffs a message in words by themselves unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving orders for certain goods. The defendant negligently omitted to send the message; and the plaintiffs, in consequence, lost large profits which they would have made by the transaction. The plaintiffs claimed damages to the amount of such profits. *Held*, that the plaintiffs were only entitled to nominal damages.—*Sanders v. Stuart*, 1 C. P. D. 326.

See NEGLIGENCE, 2, 3.

DEATH BY DROWNING.—*See SETTLEMENT*, 2.

DEBENTURE.—*See BOND*.

DECLARATION OF TRUST.—*See TRUST*, 1.

DETINUE.

Detinue for a policy of insurance, with a count in trover by an administratrix of R. B. had effected insurance upon his life, and had given the policy to the defendant. No notice was given to the insurance company, and no assignment was executed. *Held*, that although the administratrix might not be able to recover the insurance money without the policy, nor the defendant with the policy, yet as there had been a valid gift of the policy, the administratrix could not maintain the action.—*Rummen v. Hare*, 1 Ex. D. 169.

DEVIL, THE.—*See CHURCH OF ENGLAND*, 2.

DEVISE.

1. A testator gave the residue of his property to trustees in trust to divide the income equally amongst his three children during their respective lives; and after the decease of each of said children, to hold the share of which such child should be entitled to the income, in trust for his, her, or their issue. In case any of such children should die without leaving issue, the trustees were to hold the share to which such child should be entitled during life, as well originally as by survivorship or accretion, in trust for the survivor or survivors of said children during their, his, or her respective life or lives, and in equal shares if more than one; and after the decease of such survivors, the trustees were to hold the surviving or accruing share to which such survivor for the time being should become entitled for his or her life under the trusts aforesaid, in trust for his or her issue; and

in case all said children should die without leaving issue, then in trust for the representatives of the survivor. The three children survived the testator. A child died without issue; then a child died leaving issue; and finally the third child died without issue. It was urged, that, as the third child died without issue, there was, on her death, intestacy as to one-half the said residuary estate. *Held*, that the issue of the second child were entitled to the whole of said residuary estate.—*Wake v. Vasa*, 2 Ch. D. 348.

2. Devise to N. for life, remainder on events which happened, to the child or children of G., who, either before or after G.'s death, should attain twenty-one, or die under that age, leaving issue living at his, her, or their death, in fee-simple as tenants in common. At the death of N., two children of G. had attained twenty-one; and there were other children who attained twenty-one after N.'s death. *Held*, that said two children of G. were entitled to the whole estate.—*Brackenburgh v. Gibbons*, 2 Ch. D. 417.

3. A testator gave his property to a trustee in trust to pay the income to his wife for the support of her and of his children until the eldest child should attain twenty-five, or until his wife should marry again; and in case of her second marriage before any of his children should attain twenty-five, in trust to pay her £30 a year, and apply the residue of the income for the support of his children; and the trustee was to raise and pay a certain sum to each child on his attaining twenty-five, and then pay the proceeds of the residue of his estate to his wife for life, if then unmarried; but in case she should marry again, then to sell and invest so much of his estate as should produce £30 a year, and pay the same to his wife, and pay the residue equally between his children, and their issue, and their heirs and assigns as tenants in common; and in case of the death of both of his children under twenty-five without leaving issue, in trust to pay the income of the whole estate to the wife for life, and after her death to hold one moiety of the estate to the use of said wife and her heirs, and the other moiety to the use of the trustee. The wife survived the testator, and died without having married again, and leaving the testator's two sons living, who attained twenty-five. *Held*, that the gifts over on the second marriage of the wife took place upon her death, and that the two sons took equitable estates tail according to the rule in *Wild's Case*, 6 Rep. 16 b.—*Underhill v. Roden*, 2 Ch. D. 494.

See ELECTION; LEGACY; MARRIAGE, RE.

STRAINT OF; VENDOR AND PURCHASER, 2.

DISCOVERY.—*See BILL IN EQUITY*.

DISTRESS.

The lessee of a farm covenanted not to remove hay and unthreshed corn, or to sell them off the premises, but to use them for the improvement of the land demised. The landlord distrained hay and unthreshed corn for rent arrear, and sold the same with condition that they should be consumed on the

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premises; and consequently the best price was not obtained. *Held*, that the landlord could not, under 2 Wm. & M. c. 5, legally impose such a condition when selling the distress.—*Hawkins v. Watron*, 1 C. P. D. 280.

DOCUMENTS, INSPECTION OF.

The court refused to make an order on the solicitor of a defendant for the production of documents belonging to the defendant.

See Cashin v. Craddock, 2 Ch. D. 140.

DOMICILE.—*See JURISDICTION.*

EASEMENT.—*See COVENANT; PRESCRIPTION.*

ELECTION.

A., upon the marriage of his daughter B., covenanted that he would give her by will one-half of all the real and personal estate to which he should be entitled at the time of his death, after payment of his debts and legacies, which latter were not to exceed in value one-fourth of said estate. B. and her husband covenanted to settle any property so given to B. upon certain trusts under which the husband had an estate for life, and after his death B. had an estate for life, subject to which B. and her husband had a joint power of appointment among the children of the marriage. By his will, A., after giving a small annuity not amounting to one-fourth part of his estate in value, gave one moiety of his estate upon certain trusts under which B. had an estate for life, remainder to her husband for life or until he should become bankrupt, remainder as B. should appoint. The other moiety of his estate A. gave to a second daughter. B. contended that she was entitled by the settlement to three-eighths of A.'s entire estate, and by the will to one-half of what remained. *Held*, that the presumption that A. did not intend to give B. a double portion was not destroyed by the fact that the portion given by the will was slightly larger than that given by the settlement, or by the difference of the trusts in the will from those in the settlement; and that B. must elect between the provisions of the will and the settlement.—*Russell v. St. Aubyn*, 2 Ch. D. 398.

EMINENT DOMAIN.—*See LEASE*, 2.

EQUITY.—*See BILL IN EQUITY; SETTLEMENT*, 1; *TRADE-MARK.*

ESTATE TAIL.—*See DEVISE*, 3; *LUNATIC.*

EVIDENCE.

In an action upon accounts stated, it appeared that N. wrote from Battersea to T.'s attorney in London, "I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of T.'s claim, as I cannot possibly pay it down at once." *Held*, that the letter was evidence to show an account stated at London.—*Taylor v. Nicholls*, 1 C. P. D. 242.

See PRESCRIPTION; PRESUMPTION; WILL, 2.

EXECUTORS AND ADMINISTRATORS.—*See DETINUE.*

EXECUTORY DEVISE.—*See DEVISE*, 2.

FORFEITURE.—*See LEASE.*

FRAUD.—*See CONTRACT*, 2.

FRAUDS, STATUTE OF.

The plaintiff, who proposed to take a lease of the defendant's house, agreed to pay £75 towards certain alterations in the house, which it was agreed should be made. By consent of the defendant, the plaintiff had the house painted, gas-pipes laid, and other improvements made; and he also ordered gas fittings, cornices, and blinds to be made for the house, and paid certain sums of money for work done and materials provided at the defendant's request for decorating a room and making the agreed alterations. There was no valid agreement for a lease signed by the defendant. The plaintiff was obliged to give up the house through the defendant's neglect to complete said alterations. The plaintiff declared on the common counts for work done and materials provided by him for the defendant, for money paid, and money due on accounts stated. An arbitrator gave a verdict for £51. *Held*, that the plaintiff was entitled to recover money spent on the improvement of the house. Judgment on verdict.—*Pulbrook v. Lawes*, 1 Q. B. D. 84.

See CONTRACT, 1; *PLEADING.*

FRAUDULENT TRANSFER.

A. delivered possession of goods, together with an inventory, to B., in pursuance of a transaction intended to prevent A.'s creditors from being paid in full, and inducing them to accept a composition. Subsequently B. executed a bill of sale of the goods to C. for the alleged purpose of securing a debt. C. knew of the prior transaction. A. failed to come to a settlement with his creditors, and demanded back his goods from B. and C., and brought an action against C. for detaining his goods. *Held*, that A. was entitled to the goods as the intended illegal transaction was not carried out, and that he was entitled to repudiate the transfer.—*Taylor v. Bowers*, 1 Q. B. D. 291.

FREIGHT.—*See INSURANCE*, 2.

GENERAL AVERAGE.—*See LIEN*, 2.

GIFT.—*See DETINUE.*

HIGHWAY.—*See WAY.*

HUSBAND AND WIFE.

Action for assault on the plaintiff by the defendant. The plaintiff was divorced from the defendant; but the assault was committed while they were husband and wife. *Held*, that the action could not be maintained, because when the parties were husband and wife they were one person, and the difficulty was not merely one of procedure removed by the divorce.—*Phillip v. Barnett*, 1 Q. B. D. 436.

See SETTLEMENT, 4.

IMPLIED COVENANT.—*See COVENANT.*

INFANT.—*See SETTLEMENT*, 6.

INJUNCTION.—*See TRADE MARK.*

INSCRIPTION.—*See CHURCH OF ENGLAND*, 1.

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INSPECTION OF DOCUMENTS.—*See* DOCUMENTS,
INSPECTION OF.
INSURANCE.

1. A vessel was insured from "P. to N., and for fifteen days whilst there after arrival." The vessel arrived at N., discharged her cargo, and then moved to a different part of the harbor to complete her loading, and while there was damaged by a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy. *Held*, that the policy was a voyage policy, with a time policy of fifteen days ingrafted upon it; and that the insurers were liable.—*Gambles v. Ocean Marine Insurance Co.*, 1 Ex. D. 141; s. c. 1 Ex. D. 8; 10 Am. Law Rev. 408.

2. A vessel was chartered to D. by a charterparty providing that freight should be paid on unloading and right delivery of cargo at the rate of 42s. per ton on the quantity delivered, and providing further that said freight was to be paid one-half cash on signing bills of lading, less four months' interest at bank rate, remainder on right delivery of the cargo. The owner insured his freight, and D. insured the cargo at its value increased by prepayment of freight. The vessel was wrecked, and half the cargo delivered. The owner claimed from his insurers the unpaid half of his freight. The insurers contended that D. was only bound to pay one-half the freight remaining unpaid, and that they therefore were only liable to that amount, being one-quarter of the whole freight. *Held*, that the insurers were liable for the whole unpaid freight.—*Alison v. Bristol Marine Insurance Co.*, 1 App. Cas. 209; s. c. L. R. 9 C. P. (Ex. Ch.) 559; 9 Am. Law Rev. 291.

See DETINUE.INTEREST.—*See* TENANT FOR LIFE.

JURISDICTION.

A man and woman were married in the Island of Jersey; and nine years afterwards the husband deserted his wife and went to the United States, where he committed adultery. After the desertion the wife resided in England. *Held*, that the courts in England had no jurisdiction over the husband in a suit for dissolution of marriage brought by the wife.—*Le Sueur v. Le Sueur*, 1 P. D. 139.

See BILL IN EQUITY.

LEASE.

1. The defendant leased certain premises to A. and B., subject to a proviso that (*inter alia*) if the tenants or either of them should become bankrupt or assign over the demised premises, or should not fulfil their covenants, the defendant might re-enter. A. and B. covenanted to keep the premises in repair. The defendant also covenanted that he would, at the expiration of said lease, in case said covenants on the tenants' part should have been duly performed, grant to said tenants, their executors and administrators, a fresh lease of the premises, provided said tenants or either of them gave him notice of the desire to take such fresh lease. A assigned his interest

in said lease, and became bankrupt. At the termination of said lease, B. notified the defendant of his desire for a fresh lease. The premises then required repairs to the extent of £13 10s. The defendant refused to grant a fresh lease. *Held*, that B. was not entitled to a fresh lease, because the defendant's covenant was to grant a lease to both A. and B., and not to B. only, and because, by failure to repair, a condition precedent had been broken.—*Finch v. Underwood*, 2 Ch. D. 310.

2. The owner of mineral under land upon which ran a railway leased the minerals to H. The company paid H. a certain sum in consideration of his not working the minerals. H. failed to pay rent, and surrendered his lease to said owner, who then sold the minerals to the defendant. The railway company filed a bill to restrain the defendant from working the minerals to their injury, and offered to pay the defendant the value of the minerals less the amount paid to H. The company had a statute right to take land, &c., on making compensation. *It seems* that the company had a right to have the minerals unworked for fifteen years without making further compensation, as said lease was terminated by surrender and not by entry for breach of condition. Otherwise if there had been a forfeiture by entry.—*Great Western Railway Co. v. Smith*, 2 Ch. D. 235.

See COVENANT.

LEGACY.

1. A testatrix, after devising certain property, bequeathed to the plaintiffs "all my furniture, plate, linen, and other effects that may be in my possession at the time of my death." At the time of her death the testatrix was entitled, in addition to her freehold property, to furniture, plate, linen, wearing apparel, jewellery, sums in cash, and £130 in the savings bank. *Held*, that all said personal property passed by the bequest.—*Hodgson v. Jex*, 2 Ch. D. 123.

2. A testator gave each of his younger sons £1,000 each, "which I charge on my estate at A. hereinafter devised [to his eldest son]; but I direct that the same shall not be raiseable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled upon F. for life, remainder to said eldest son for life, remainder to his issue in tail male. The eldest son died before F., and never came into actual possession of the M. estate. *Held*, that the legacies failed, and fell into the residuary estate.—*Taylor v. Lambert*, 2 Ch. D. 177.

3. A testator gave his sons H. and J. £16,000 upon trust to pay the interest of £8,000, part thereof, to his daughter Ann for life, remainder to her children; and to pay the interest of the remaining £8,000 to his daughter Sarah for life, "in the same manner in every respect, and subject to the same control," as he had before directed as to his daughter Ann. He then gave £8,000 in trust for his son Samuel for life, remainder to his children, and empowered his trustees to

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apply the interest of all said sums for the maintenance and education of the children of said daughters and son. Sarah died leaving children. *Held*, that by implication Sarah's children were entitled to £5,000.—*Sweeting v. Prideaux*, 2 Ch. D. 413.

See CY-PRES; DEVISE; ELECTION; MARRIAGE, RESTRAINT OF.

LEX FORI.

A pier at Marbella in Spain, belonging to an English company, was injured by an English steamship. By the law of Spain in such cases the master and mariners of the ship, and not the ship or her owners, are liable in damages. The company instituted a cause of damage in England against the steamship. *Held*, that the law of Spain, and not that of England, governed the case.—*The M. Maxham*, 1 P. D. 107; s. c. 1 P. D. 43; 10 Am. Law Rev. 704.

LEX LOCI.—See LEX FORI.

LIEN.

1. W. was in the habit of sending goods to P.'s warehouse, where they were packed for shipment. W. became bankrupt while goods belonging to him were at the warehouse of P., who claimed a lien upon them, not only for the charges for packing them, but for packing other goods of W., which P. had previously packed. *Held*, that P. had such a general lien.—*In re Witt. Ex parte Shubbrook*, 2 Ch. D. 489.

2. The master of a vessel which had gone ashore with the cargo on board put the plaintiff on board as his agent to do what was for the benefit of all concerned. The plaintiff did work and expended money in discharging the cargo, which he brought to a place of safety, and took possession of. The vessel remained, and was sold as a wreck. The defendant, the holder of the bill of lading of the cargo, by S. his agent, demanded the cargo, and S. verbally promised that the plaintiff should be paid his said expenses and his charges for said work; and thereupon the plaintiff delivered the cargo to S. S. had no special authority to make said promise. *Held*, (1) that the plaintiff had a lien for his said expenses and charges, which were in the nature of general average or salvage charges; and (2) that S. had implied authority to give security for any charges for which there was a lien on said cargo, and that the plaintiff's giving up his lien was a good consideration of the promise made by S.—*Hingston v. Wendt*, 1 Q. B. D. 367.

See SETTLEMENT, 3.

LUNATIC.

The committee of a lunatic tenant in tail of an estate subject to a charge for portions petitioned for leave to execute a disentailing deed for the purpose of raising the charge by a mortgage. The court refused to allow the entail to be barred further than was necessary, and ordered a mortgage for a term of years without power of sale.—*In re Pares*, 2 Ch. D. 61.

MARRIAGE.—See PRESUMPTION.

MARRIAGE, RESTRAINT OF.

A testator devised all his real estate to three women during their lifetime, and proceeded as follows: "And when any or some of the before-mentioned parties named, M. my sister, E. her daughter, or S. the daughter of the said D. J., shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister J., together with her daughter Mary, during their lifetime; provided the said Mary, daughter of my sister, shall remain in her present state of single woman; otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties, share and share alike. Mary married. *Held*, that Mary's estate ceased upon her marriage. It seems that the rule that conditions in restraint of marriage are invalid does not extend to devise of land. The court considered that the testator's object was only to provide for her while unmarried, and not to restrain her marriage.—*Jones v. Jones*, 1 Q. B. D. 279.

MARRIAGE SETTLEMENT.—See SETTLEMENT.

MASTER AND SERVANT.—See NEGLIGENCE.

MINES.—See LEASE, 2.

MINORITY.—See SETTLEMENT, 6.

MORTGAGE.—See LUNATIC; SOLICITOR AND CLIENT; TRESPASS.

NEGLECTANCE.

1. The plaintiff sent a heifer to the P. station on the defendant's railway. On the arrival of the car containing the heifer, it had to be shunted on to a siding; and as there were only one or two porters to shunt the car, the plaintiff assisted in the shunting. While so doing, the plaintiff was injured by a train through the negligence of the defendants' servants. *Held*, that the defendants were liable, as the plaintiff assisted in the shunting with consent of the defendants, and was not a mere volunteer.—*Wright v. London & North Western Railway Co.*, 1 Q. B. D. 252; s. c. L. R. 10 Q. B. 298; 10 Am. Law Rev. 296.

2. A. and B. owned adjacent houses, and A. was entitled to the support of B.'s soil for his house. B. employed R. to pull down and rebuild his house by a contract, under which R. agreed to take upon himself the risk and responsibility of shoring and supporting, so far as might be necessary, the adjoining buildings affected by the alteration during the progress of the works, and to make good any damage which might be sustained by said buildings during the progress or in consequence of the said works, and to satisfy any claims for compensation arising therefrom. A.'s house was injured by said works in consequence of R.'s not properly underpinning A.'s walls. *Held*, that B. was liable for said injury.—*Bower v. Peate*, 1 Q. B. D. 321.

3. The tenant of a house, knowing that a lamp suspended from an iron bracket in front

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of the house was of some age, employed an experienced gas-fitter to examine it and put it in thorough repair. Subsequently a servant raised a ladder against the bracket, which he mounted for the purpose of cleaning the lamp. The ladder slipped, and the servant caught hold of the bracket, and thereby shook the lamp, which fell upon the plaintiff. On examination it appeared that the breakage of the lamp fastenings was caused by their general decay. The plaintiff brought an action against the tenant. *Held*, that the tenant was liable for the plaintiff's injuries. That the tenant had employed an independent contractor to repair the lamp was no excuse for his failure to perform his duty to keep the lamp in repair.—*Tarry v. Ashton*, 1 Q. B. D. 314.

4. The defendant railway was obliged by statute to carry all carriages, &c., upon its lines, upon payment of certain tolls; and in fact received between twenty thousand and thirty thousand foreign trucks weekly. One G. hired trucks from a waggon company which was to keep the trucks in repair. One of these trucks arrived at Peterborough on the defendant's line, and was there examined by a person in the defendant's employ, and found to have a spring broken and a part of the wood-work cracked. The waggon company put in a new spring without examining the truck, but did not repair the crack in the wood. The truck was then carried forward, and broke down owing to an old crack in the axle which had not been discovered, and the plaintiff was injured. The jury found that the defect in the axle would have been discoverable upon fit and careful examination; that it was not the duty of the defendant to examine the axle by scraping off the dirt, and so minutely examining it that the crack would have been seen; and that it was the defendant's duty to require from the waggon company some distinct assurance that the truck had been thoroughly examined and repaired. Verdict for defendant, with liberty to the plaintiff to move for a verdict for an agreed sum. *Held*, that the defendant was entitled to a verdict.—*Richardson v. Great Eastern Railway Co.*, 1 C. P. D. 842; s. c. L. R. 10 C. P. 486; 10 Am. Law Rev. 296.

5. Certain gates belonging to the defendants' gas-works were safe when open, but when half open were liable to fall. The plaintiff, a servant in the defendants' employ, passed through the open gates; but returning not long after, the gates were partly open, and in passing through them the plaintiff was injured. There was no evidence to show that any one had touched the gates in the mean time. Before the accident, the defendants' manager had notice of the unsafe condition of the gates, and he had promised to attend to the matter: and orders had been given to make a bar which would prevent the gates falling, but these orders had not been carried out. *Held*, that the defendants were not liable, as the plaintiff had not shown that the defendants undertook personally to superintend the works, or that the persons employed by the defendants were not proper and com-

petent persons, or that the defendants had failed to furnish the persons employed with adequate materials and suitable resources for carrying on said works.—*Allen v. New Gas Company*, 1 Ex. D. 251.

See CARRIER; COLLISION.

NOTICE.—See DAMAGES, 1.

NUISANCE.

A chemical company, which had the right to drain from their premises through two separate drains into a sewer, discharged through one drain liquid impregnated with muriatic acid, and through the other liquid impregnated with sulphur; and the two liquids combined in the sewer and gave off sulphuretted hydrogen, which escaped into a street, and was injurious to the public health. *Held*, that the escape of the sulphuretted hydrogen was a nuisance, arising from the act of the company, within 18 & 19 Vict. c. 121.—*St. Helen's Chemical Co. v. Corporation of St. Helen's*, 1 Ex. D. 196.

OFFER.—See VENDOR AND PURCHASER, 1.

PACKER'S LIEN.—See LIEN, 1.

PARTNERSHIP.

A. borrowed £250 of B. in 1869, and signed the following agreement: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share of the O. Music Hall, to be drawn up under the Limited Partnership Act." Subsequently A. wrote to B. offering to repay the money on Sept. 1, 1872, and that proportion of the profits, if any, to which B. was entitled under said agreement. A. made a tender in accordance with said letter, which B. refused; and B. filed a bill against A., claiming to be a partner, and praying specific performance of said agreement and for an account. A. answered on Feb. 21, 1873, claiming that said money was advanced as a loan, and that in any event there was only a partnership at will, which was terminated by said letter. *Held*, that said agreement constituted A. and B. partners at will, and that the partnership was not terminated by A.'s letter, but was terminated by his answer to B.'s bill; and that B. was entitled to one-eighth share in the profits up to Feb. 21, 1873, and one-eighth of the value of the music hall at that date; and accounts were ordered.—*Syers v. Syers*, 1 App. Cas. 174.

PARTY-WALL.—See COVENANT.

PATENT.

The defendant, under contract with officers of the British government, furnished rifles according to a certain patent, at a certain price, the government supplying the stock and tube for the barrel of each piece. It was held that the contract was for the manufacture of the rifles; and that although the rifles were made by an independent contractor, the user of the patent method of manufacture was a user by the government, and that the defendant was not liable for in-

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fringement of patent.—*Dixon v. London Small Arms Co.*, 1 Q. B. D. 384.

PLEADING.

A defendant demurred to a bill of equity for specific performance of a contract, showing for cause of demurrer that there was no memorandum signed by him within the Statute of Frauds. The demurrer was overruled, the bill amended, and the case heard. The defendant did not by answer plead the Statute of Frauds. Specific performance was ordered, and the defendant appealed. *Held*, that the defendant might take said objection on appeal, although not set forth in his answer.—*Johansson v. Bonhole*, 2 Ch. D. 298.

See FRAUDS, STATUTE OF.

POSSESSION, REDUCTION TO.—See SETTLEMENT, 2.

PRESCRIPTION.

The plaintiff and defendant held adjoining lands fronting on a creek communicating with the sea. To prevent the water at high tides from overflowing their lands, the proprietors of said lands and of other adjoining lands, had maintained sea-walls time out of mind. Such walls gradually subsided, and it was necessary from time to time to raise them by placing fresh materials on the top. The defendant neglected to keep his wall at the proper level; and in consequence the water came over his wall, and flowed over his land on to the plaintiff's land. *Held*, that the evidence did not establish a prescriptive right in the plaintiff to have the wall on the defendant's land maintained at height sufficient to keep the water from the plaintiff's land, and that the defendant was under no liability at common law to maintain such a wall.—*Hudson v. Tabor*, 1 Q. B. D. 225.

PRESUMPTION.

A marriage took place in a chamber some yards from a church while the church was under repair. Divine services had several times been performed in the chamber. The man married again; and in a prosecution for bigamy it was *held* that it must be presumed that the building in which was the chamber was licensed, in accordance with the maxim, *Omnia presumuntur rite esse acta*; and that the presumption was stronger, as the clergyman who celebrated the marriage might by statute have been indicted for felony if he knowingly did so in an unlicensed place.—*Queen v. Cresswell*, 1 Q. B. D. 448.

PRINCIPAL AND AGENT.—See BILLS AND NOTES; LIEN, 2; NEGLIGENCE, 2.

PROBATE.—See WILL, 1.

PROFITS.—See DAMAGES, 1.

PROPERTY.—See SALE.

RAILWAY.

The plaintiff took a ticket at the defendants' station for S. *via* Leeds and York. The ticket had indorsed upon it the words, "Issued by the (defendant) company, subject to

the company's regulations, and to the conditions of the time-tables of the respective companies over whose lines this ticket is available." The conditions referred to were the following: "The published time-bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations; it being understood that the trains shall not depart before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable: but the directors give notice that they do not undertake that the trains shall start and arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party." The train carrying the plaintiff arrived at Leeds at 5.27 P.M., being 27 minutes late, so that he lost the usually connecting train which left at 5.20 P.M. He therefore proceeded to York by the next train, which left Leeds at 5.55 P.M., and arrived at York at 7 P.M., where it stopped. The next train for S. did not leave York until 8 P.M., to arrive at S. at 10 P.M.; and the plaintiff therefore took a special train, and arrived at S. between 8.30 and 9 P.M. If the plaintiff's train had made its connection properly at Leeds, the plaintiff would have arrived at S. in the ordinary course at 7.30 P.M. The plaintiff had no business necessitating his arrival at S. at any particular time. The plaintiff brought this action to recover the cost of the special train. *Held*, that the defendants were not liable.—See the various reasons of the judges of the Court of Appeals in support of their opinions.—*Le Blanche v. London & North Western Railway Co.*, 1 C. P. D. 286.

See LEASE 2; NEGLIGENCE, 1, 4.

REMAINDER-MAN.—See TENANT FOR LIFE.

RESTRAINT OF MARRIAGE.—See MARRIAGE, RESTRAINT OF.

REVERSIONARY INTEREST.—See SETTLEMENT, 5, SALE.

1. C. agreed to sell H. 200 tons potatoes grown on C.'s land at W., to be delivered during September and October, and paid for as taken away. C. sowed land sufficient in an ordinary season to produce a much larger quantity than 200 tons; but a disease which C. could not have prevented attacked the crop and caused it to fail, so that only 80 tons were delivered to H. An action was brought by H. against C. for failure to deliver the residue of the 200 tons. *Held*, that the contract to deliver the potatoes of a particular

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kind and grown on a specific place was excused by the failure of the crop without C.'s fault.—*Hovell v. Coupland*, 1 Q. B. D. 258; s. c. Law Rep. 9 Q. B. 462; 9 Am. Law Rev. 286.

2. One A. Blenkarn took premises at 37 W. Street, and ordered goods of the plaintiffs, signing his orders so as to look like A. Blenkiron & Co., which was the name of a well-known firm at 123 in said street. The goods were supplied, and Blenkarn sold them to the defendant, who sold them to others. The plaintiffs brought trover. *Held*, that as the plaintiffs intended to contract with the persons carrying on business at 37 W. Street, although they mistakenly supposed him to be of the firm of Blenkiron & Co., the property in said goods passed to Blenkarn, and could not be divested from the defendant, who had acquired the goods *bona fide*.—*Lindsay v. Cundy*, 1 Q. B. D. 348.

3. The defendant contracted to purchase of the plaintiff 4,500 quarters oats: "Shipment by steamer or steamers during February next. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of the navigation." The plaintiff shipped 1,139 quarters which arrived in time, but were not accepted by the defendant, and the remainder by another vessel which did not arrive in time. *Held*, that the defendant was bound to accept said oats which arrived in time.—*Brandt v. Lawrence*, 1 Q. B. D. 344.

See CONTRACT, 1; DISTRESS; FRAUDULENT TRANSFER; VENDOR AND PURCHASER, 1, 3.

SALVAGE.

Towage services may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress. . . If the vessel was in a state of danger at the time, and he (the captain of the vessel rendering the services) had towed her, he would be entitled to be considered as a salvor. . . It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. Sir Robert Phillimore (adopting the language of Dr. Lushington) in *The Strathnaver*, 1 App. Cas. 58.

See LIEN, 2.

SEA-WALL.—See PRESCRIPTION.

SEAWORTHINESS.—See SHIP.

SECURITY.—See BOND.

SETTLEMENT.

1. Ante-nuptial articles were signed, providing that the wife's personal property should, after the marriage, be transferred to trustees upon trust for the husband and wife during their lives: "the trustees of the capital being for and amongst the children according to the appointment of said husband and wife or the survivor of them, and in default of appointment, to the children equally; in the event of there being no children, and

of the husband being the survivor, the trust property to be at his absolute disposal." After the marriage, a settlement was executed; but it contained no provision for the event of there being no child and the husband dying before the wife. The property was transferred to trustees; and the husband received the income for several years, and died with part of the income in arrear. There was one child of the marriage, who died an infant in the lifetime of both parents. The representative of the husband claimed the arrears of income, and the capital subject to the wife's estate. *Held*, that the capital and arrears of income belonged to the wife. The settlement was not in accordance with the ante-nuptial agreement, which would have been carried into effect by giving shares to the sons of the marriage contingent upon their attaining twenty-one, and to the daughters contingent on attaining twenty-one or marrying; or by contingent limitations over of the shares of sons dying under twenty-one, and of daughters attaining that age or marrying; in either of which cases, the husband would not have taken as representative of a child dying an infant and unmarried.—*Cogan v. Duffield*, 2 Ch. D. 44; s. c. L. R. 20 Eq. 789; 10 Am. Law Rev. 476.

2. In a marriage settlement, L. agreed that he would, after the marriage, transfer certain consols to trustees in trust for himself for life, and after his death for his intended wife for life, and after the death of the survivor in trust for the children; and if no children, then in trust for the survivor of the settlers and his or her executors, &c. G. assigned by the settlement certain bonds to the same trustees upon trust to pay the income to L. during the joint lives of L. and G.; and if L. should survive G., then in trust after G.'s death to transfer the bonds to such persons as G. should by will appoint; and in default of appointment, to her next of kin; but if she survived L., then to transfer the bonds to G., her executors, &c. L. by will gave all his property to G., and G. by will gave her property to L. for life, remainder to her sisters. Both L. and G. were lost in the *Liberia*. It was contended that by the settlement the husband had reduced the wife's property into possession; and that there being no presumption of survivorship, the trusts of the settlement were exhausted, and that the husband's representative was entitled to the whole property. *Held*, that the funds settled by each settlor belonged to his or her respective legal representatives.—*Wollaston v. Berkeley*, 2 Ch. D. 213.

3. Previously to a marriage, the intended husband signed a memorandum agreeing to transfer certain stocks, then forming part of the intended wife's property, into the names of the wife and her son by a former marriage, in trust for the wife; "neither party having power to dispose of said stocks without consent of both parties to such disposal." After the marriage the husband got possession of part of the stocks, and disposed of them. It was contended that there was a trust for the wife's separate use, and that she had the abso-

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lute power of disposing of the stocks. *Held*, that the husband must make good the amount of stocks disposed of by him, and that the wife and her son as trustees had a lien upon the remainder of the wife's property to make good said amount. *Hastie v. Hastie*, 2 Ch. D. 304.

4. By marriage settlement, a wife's property was settled as to one moiety upon certain trusts for the wife, and as to the other moiety in trust for the husband and his heirs. The wife obtained a decree of divorce from her husband, and filed a bill for a declaration that she was entitled to the whole of the settled property, and that it might be conveyed to her. *Held*, that the husband's rights were not forfeited by the dissolution of marriage.—*Burton v. Sturgeon*, 2 Ch. D. 318.

5. Covenant in a marriage settlement that all the property to which the woman or the man in her right should during coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable from J., should be settled upon certain trusts. Before the marriage, the woman was entitled to the reversion in a fund subject to the life interest of a person who survived said woman. *Held*, that said reversionary interest was not subject to said covenant.—*In re Jones's Will*, 2 Ch. D. 362.

6. Upon the marriage of a man with a woman who was a minor, a settlement was made of property belonging to both. The husband died; and a suit was brought against the woman, then of age, in relation to property brought into said settlement by the husband. The suit was settled by consent of the wife, and a certain part of the property paid to her. Subsequently the woman married again; and a petition was filed by her and her second husband, praying, among other things, that certain funds of the wife should be carried over to the credit of an account entitled "The Settlement Account," made on the marriage of said woman with her first husband; and a decree was made accordingly. Afterward the woman and her husband filed a bill to have said settlement set aside; and they alleged that they did not know or intend that said petition might have the effect of confirming said settlement. *Held*, that the settlement had been confirmed by the acts of said woman and her second husband.—*White v. Cox*, 2 Ch. D. 387.

See TRUST, 2.

SHIP.

The defendants received and shipped on board their vessel certain heavy armor-plates belonging to the plaintiff. On the voyage one of them broke loose, owing to the rolling of the vessel, and went through the side of the ship, which was in consequence lost, with all its cargo. At the trial the judge instructed the jury that a ship-owner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bona fide* endeavor to make her fit; and he left it to the jury whether the vessel at the time of her sailing was in a state, as regards the stowing and receiving of said plates, reasonably fit to en-

counter the ordinary perils that might be expected on said voyage; and whether, if she was not in a fit state, the loss was caused by that unfitness. *Held*, that a ship-owner warrants as above stated, although not a common carrier; and that said directors were correct.—*Kopitoff v. Wilson*, 1 Q. B. D. 377.

See CHARTERPARTY; COLLISION; INSURANCE, 2; *LEX FORI*; LIEN, 2; SALVAGE. SOLICITOR AND CLIENT.

A solicitor refused to lend money to his client except on mortgage containing stipulations that he might charge a commission upon rents received by him as mortgagee in possession, and that arrears of interest should be deemed a part of the principal debt. In ordering an account, the court disregarded these stipulations.—*Eyre v. Hughes*, 2 Ch. D. 148.

SPECIAL DAMAGE.—See DAMAGES, 1.

SPECIFIC PERFORMANCE.—See VENDOR AND PURCHASER, 3.

STATUTE OF FRAUDS.—See CONTRACT, 1; FRAUDS, STATUTE OF; PLEADING.

STOPPAGE IN TRANSITU.—See BILLS AND NOTES. SURETY.

Action on a joint and several bond given by a debtor and the defendant and others for £14,000 to secure a debt of £7,000, and conditioned to be void if the obligors, or either of them, should in satisfaction of the £7,000 pay £7,000, provided that the defendant should not be liable under the bond for a sum or sums exceeding altogether in debt or damages £1,300. The debtor paid £1,000, went into bankruptcy, and paid 9s. 2d. in the pound, leaving more than £1,300 unpaid on said debt. The defendant contended that he was entitled to deduct a 9s. 2d. in the pound from the £1,300. *Held*, that the defendant guaranteed the whole £7,000, although only liable for £1,300, and was not entitled to deduct a rateable proportion of the dividend, but was liable for £1,300.—*Ellis v. Emmanuel*, 1 Ex. D. 157.

SURRENDER.—See LEASE, 2.

TELEGRAPHIC MESSAGE.—See DAMAGES, 2.

TENANT FOR LIFE.

A testator directed that his real estate should be sold, and the proceeds applied in aid of his personal estate; but more than a year elapsed before the sale took place. The personal estate was insufficient to pay debts; but after they were paid, a surplus of the proceeds of the real estate remained. *Held*, that, as between tenant for life and remainder-man, all interest that had accrued during the first year after the testator's death and subsequently must be paid by the tenant for life.—*Marshall v. Crouther*, 2 Ch. D. 199.

See TRESPASS.

THEATRICAL ENGAGEMENT.—See CONTRACT, 2.

TITLE.—See VENDOR AND PURCHASER, 2.

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TITLE OF HONOUR.—*See CHURCH OF ENGLAND, 1.*

TOWAGE.—*See SALVAGE.*

TRADE-MARK.

The defendant W. advertised and sent out trade circulars to this effect: "W.'s patent *Singer* Sewing Machine.—W.'s sewing machines are the only patented machines of this class. W.'s machines have special improvements over any other make, English or American, of this machine. Buy no machine before you have inspected W.'s patent *Singer*." The *Singer* Manufacturing Company, the plaintiffs, had its trade-mark, and W. had his own unlike the plaintiffs'; and W. did not attach the word "*Singer*" to any part of his machine. An injunction to restrain W. from advertising as aforesaid was refused, as he was neither using the plaintiffs' trade-mark, nor representing that his machines were made by the plaintiff.—*Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 435.

TRESPASS.

The mortgage of a life tenancy, in possession under an order of court, was held not to be a trespasser upon the death of the tenant for life.—*Hickman v. Upcott*, 2 Ch. D. 617.

See WAY.

TROVER.—*See SALE, 2.*

TRUST.

1. A solicitor, who had received money from E. for investment, executed a declaration of certain personal property for the benefit of E., but without her knowledge. About a fortnight later, the solicitor died insolvent. Whether he knew of his insolvency did not appear. *Held*, that E. was entitled to the personal property, as the gift was *bon fide* and valid within 18 Eliz. c. 5.—*Middleton v. Pollock. Ex parte Elliott*, 2 Ch. D. 104.

2. Trustees who held real estate for a term of a thousand years were empowered during certain lives and twenty-one years from the testator's death, and after payment of certain charges, to keep certain buildings in repair, and to erect any new or additional buildings, and generally to make such outlay for the improvement or amelioration of the estate as the trustees should think fit or conducive to the general benefit of the estate or the tenants. The income was insufficient to more than pay said charges. The court allowed the trustees to repay from the principal certain sums expended for new buildings and drainage upon which the tenants paid five per cent interest.—*In re Leslie's Settlement Trusts*, 2 Ch. D. 185.

3. Personal property was settled in trust for the wife of H. for life, remainder in trust for H. for life, remainder to the children of H. and his wife; and the trustees had power to invest in real estate, and to allow H. and his wife to occupy an estate so purchased. Certain real estate was devised to H. in trust for sale, and to hold one-third of the proceeds upon the above mentioned trusts. This real estate was put up for sale; and H. requested the trustees of the personal estate to purchase a portion of it upon which H. and his wife desired to reside. The trustees consented,

and left the purchase in the hands of H. H. then requested B. to act as agent of the trustees in purchasing; and H. subsequently went to C., and requested him to fix the reserve price of said portion of the land. C. fixed the reserve price at £6,000. H. then requested B. to bid up to £8,000 for the land, and at the sale B. bought the land for £7,230. As the trustees had not enough money, a part of the purchase-money was supplied by H., who acted with good faith throughout the transaction. Certain *caveats* *que* trust of the land brought a bill alleging that to the extent of the moneys supplied by him H. was a purchaser from himself of the trust-property, and praying for a resale at a price not less than said purchase price, the surplus, if any, to be invested for the purposes of the trust; but if no surplus, then the trustees to be held to said purchase. *Held*, that said purchase was proper, and that the money contributed by H. must be held to have been added by him to the trust-funds held by said trustees.—*Hickley v. Hickley*, 2 Ch. D. 190.

See SETTLEMENT, 3; VENDOR AND PURCHASER, 2, 3.

VENDOR AND PURCHASER.

1. The defendant, on June 10, signed a memorandum, whereby he agreed to sell a piece of land to the plaintiff for a certain sum. "P.S.—This offer to be left over until June 12." The postscript was signed by the defendant. On June 11 the defendant sold the land to a third party; and after this the plaintiff, who knew of the sale, offered to take the land according to said agreement. *Held*, that the defendant had made only an offer to the plaintiff, and might at any time withdraw it verbally, or by a sale brought to the knowledge of the plaintiff.—*Dickinson v. Dodds*, 2 Ch. D. 463.

2. A. agreed to purchase and E. agreed to sell certain real estate called Bury; but before any conveyance was executed E. died. By his will E. devised all his real estate to H. and M., and all his real estate which might at his death be vested to him as trustee to M. alone. *Held*, that the Bury estate passed to M., and that the concurrence of the testator's heir-at-law in a conveyance was not necessary in order to give A. a complete title.—*Lysaght v. Edwards*, 2 Ch. D. 499.

3. A trustee of real estate who had power to sell, leased the property for thirty years by deed, to which the beneficiaries were parties. The lessee underlet the premises; and subsequently, while the lease was still running, the trustee determined to sell the property, and by arrangement with the lessee it was put into one lot, and not as a reversion and leasehold interest separately. The particulars of sale, after disclosing all the facts in detail, stated that the lessee would concur in the sale, so that the property would be sold subject to the underleases only. The defendant agreed to purchase the estate at a certain price, and the trustee agreed with the lessee that the latter should have a certain portion of the purchase-money. The defend-

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ant refused to complete the purchase upon the ground that the value of the lessee's interest had not been determined *before* the sale, so that the burden was thrown on the defendant of seeing that a proper proportion of the purchase money was paid to the trustee; and he insisted that to settle this question he was entitled to the concurrence of the beneficiaries in the conveyance of the property to him. *Held*, that the trustee was entitled to a decree for special performance of the defendant's agreement to purchase.—*Morris v. Debenham*, 2 Ch. D. 540.

VESTED INTEREST.—*See* DEVISE, 2.

WARRANTY.—*See* CONTRACT, 3; SHIP.

WAY.

In consequence of ways leading to the different ends of a highway being stopped up, access to either end of the highway ceased. *Held*, that the highway ceased to be a highway. Coleridge, C. J.: "If the defendants had a right to be there [on the former highway], though they got there by an act of trespass, they would not be trespassers for being there."—*Bailey v. Jamieson*, 1 C. P. D. 329.

WILL.

1. W. B. Astor made two wills, the latter of which disposed of British funds only; and he directed that it should not affect his first will, which related to property in America. The first will was very long. Probate was granted in England of the second will only, with a note of reference to the authenticated copy of the first will filed in the registry.—*In the goods of Astor*, 1 P. D. 150.

2. The contents of a lost will was allowed to be proved by secondary evidence; and probate was granted of the portion proved, although it was not the whole will. Declarations of the testator made both before and after the execution of his will were admitted.—*Sugden v. Lord St. Leonards*, 1 P. D. 154.

See CY-PRES; DEVISE; ELECTION; LEGACY; MARRIAGE, RESTRAINT OF; VENDOR AND PURCHASER, 2.

WORDS.

"*Children and their issue and their heirs.*"—

See DEVISE, 3.

"*Depraver of the Book of Common Prayer.*"—

See CHURCH OF ENGLAND, 2.

"*Evil Liver.*"—*See* CHURCH OF ENGLAND, 2.

"*Issued.*"—*See* BOND.

"*Reverend.*"—*See* CHURCH OF ENGLAND, 1.

"*Survivor.*"—*See* DEVISE, 1.

WORK DONE.—*See* FRAUDS, STATUTE OF.

Unprofessional Conduct—Contempt of Court.

TO THE EDITOR OF THE LAW JOURNAL:

SIR,—A case has lately been pending in the Court of Chancery at Cornwall, and a judgment delivered therein by Mr. Vice-Chancellor Blake, which it appears to me, as one interested in the dignity of the profession, should be formally brought under the notice of the Benchers of the Law Society as the duly constituted guardians of the honour of the legal profession.

The case to which I have reference is that of *Pringle v. Macdonald*, the defendant being Mr. Henry Sandfield Macdonald, a barrister and attorney-at-law.

The bill alleged an offer from Macdonald for the purchase of three-quarters of the north half of lot No. 21, on the south side of Second street in Cornwall, and its acceptance by Pringle; that the defendant afterwards came to the house of the plaintiff with his clerk, who said that a deed had been prepared in accordance with their agreement; that he wished to procure the signature of the plaintiff and his wife; that the plaintiff, relying on the honesty, good faith, and legal knowledge of the defendant, did not read the deed which he and his wife signed; that he subsequently ascertained that defendant claimed to be the owner of the west three-quarters of the whole lot; the bill charged that the signature to the deed was procured by fraud and misrepresentation, and that plaintiff relied on the defendant as his solicitor, and he prayed for a reconveyance.

The answer denied that the agreement was for the purchase of the west three-quarters of the north half, and the charges of fraud and deceit; alleged a willingness to rescind the whole transaction; denied the truth of all the allegations in the bill, and asked that it should be dismissed with costs.

After a patient hearing of the case, His

CORRESPONDENCE.

TO CORRESPONDENTS.

We cannot publish communications unless accompanied by the name of the writer, as a guarantee of good faith.

CORRESPONDENCE.

Lordship gave his decision, finding that the defendant had by fraud and misrepresentation induced the plaintiff to execute the deed. He also declined to believe Mr. Macdonald when he swore that the words "north half" had not been inserted in the agreement by him, and were not in his handwriting.

Not content with receiving so well merited a rebuke from the Bench, the defendant, who is the proprietor of the Cornwall "Freeholder," has the audacity to insinuate that the Vice-Chancellor was, in giving judgment as he did, actuated by motives of personal hostility to him by reason of the fact that when, some years ago, the defendant was a student in the office in which Mr. S. H. Blake was at that time one of the partners, he had made use of his position and the means thus placed at his disposal to write to the since defunct *Daily Telegraph* a series of letters in which the Chancery Bar, and the Messieurs Blake in particular, were very strongly animadverted upon. It certainly would have suggested itself to the ordinary mind that it would, irrespective altogether of the respect due from the Bar to the Bench, have been as well to allow that matter as well as the expulsion which followed, to rest in oblivion. Since, however, the defendant has thought fit to allude to it he must now bear the odium attaching to it.

I trust that the officers of the Law Society will at once take steps to purge the Society of one whose conduct has been so unworthy of a member of the profession, who labours under so severe a censure, and who, if allowed to continue in the practice of an honourable profession, will be enabled to bring still greater discredit upon his gown and work further harm to society.

It will be a matter of serious regret that the son of one who has been the first law officer of the Crown in the Province,

should be dealt thus harshly with—but the Benchers of the Law Society owe it to themselves, to the profession they represent, and the trust placed in their hands, to mete out justice to so grievous and unrepentant an offender.

I enclose my card, and you are at perfect liberty to make such use of my name as you may think fit.

BARRISTER-AT-LAW.

November 6th, 1876.

[We have expressed our opinion elsewhere. The matter should be brought formally before the Benchers.—Eds. L.J.]

Suggested Amendments of the Law.

TO THE EDITOR OF THE LAW JOURNAL.

DEAR SIR,—I have read with great interest, the letters in the *Law Journal*, for October and November, 1876, suggesting amendments of the law, and think that discussions of this nature are of great benefit, especially to law students.

In the letter of G. S. H., he says "that the interest of a mortgagee can be sold under a *fi. fa.* goods." I would like to hear fully his authority for the statement, as I have been informed to the contrary, and have not been able to find the law for it.

As the question of amendments has come up, I would like to make a couple of suggestions:—

1. That writs of summons be abolished, and that all actions at law be commenced by a declaration, which would be analogous to the bill of complaint in Chancery.

2. That upon filing an affidavit shewing proper reasons for doing so, a *lis pendens* against lands be granted in an action at law, instead of filing a bill in Chancery for that purpose, which has to be done now.

LEX.

LAW SOCIETY, EASTER TERM.

**LAW SOCIETY OF UPPER CANADA.**

OSGOODE HALL, TRINITY TERM, 40TH VICTORIA.

DURING this Term, the following gentlemen were called to the degree of Barrister-at-Law. The names are given in the order in which the Candidates entered the Society, and not in the order of merit :

PHILIP MCKENNER.
THOMAS HUNTER FURDON.
JOHN, THOMAS LENNOX.
HEBER ARCHIBALD.
WILLIAM BURTON DOHERTY.
FRANCIS RYE.
ALEXANDER JOHN B. MACDONALD.
EMANUEL THOMAS EMERY.

And the following gentlemen received Certificates of Fitness, namely :

HENRY PETER MILLIGAN.
IAN ALEXANDER MORTON.
ALBERT OGDEN.
J. JAMES KEHOE.
ERASTUS BLAIR STONE.
WILLIAM BURTON DOHERTY.
ALBERT CLEMENTS KILLAM.
WILLIAM WYLD.
FREDERICK WILLIAM CARY.
W. COSBY MAHAFFY.
ROBERT EDWIN WOOD.
JOHN S. L. WADK.

And the following gentlemen were admitted into the Society as Students-at-Law :

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ROBERT DOBREE CARY.
WILLIAM GEORGE EAKINS.
ALEXANDER CAMPBELL SHAW.

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JOHN S. MCBETH.

COLIN CAMPBELL.
JAMES HENRY.
WILLIAM ALEXANDER MACDONALD.
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THOMAS H. JONES.
WILLIAM CHARLES FREY.
SYDNEY BEEGIN.
FRANKLIN FORSTER NOTON.

Articled Clerks.

JOHN WILLIAMS.
ROBERT STRACHAN.

After Hilary Term, 1877, a change will be made in the Preliminary Examinations.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes, Book 3 ; Virgil, *Aeneid*, Book 6 ; Caesar, Commentaries, Books 5 and 6 ; Cicero, *Pro Milone*. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations ; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's), English Grammar and Composition

LAW SOCIETY, EASTER TERM.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cassar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3, Outlines of Modern Geography, History and (W. Doug. Hamilton's), English Grammar and Composition—Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), C. S. U. C. caps. 42 and 44, and amending Acts.

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, and Ontario Act 38 Vict. c. 16, Statutes of Canada, 29 Vict. c. 28, Administration of Justice Acts 1873 and 1874.

That the books for the final examination for Students-at-Law shall be as follows:—

1. For Call.—Blackstone, Vol. I., Leake on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding—Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Hawkins on Wills, Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. I., Stephen on Pleading, Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. C. c. 12, C. S. U. C. c. 42, and amending Acts.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Taylor's Equity Jurisprudence, Fisher on Mortgages, Vol. I., and Vol. II., chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

PRIMARY EXAMINATIONS FOR STUDENTS-AT-LAW AND ARTICLED CLERKS.

TO THE BENCHERS OF THE LAW SOCIETY:

The Committee on Legal Education beg leave to submit the following report:

Your Committee have had under consideration the representations made from time to time to the Benchers, and referred to your Committee, respecting the different courses of study prescribed for Matriculation in the Universities, and for Primary Examination in the Law Society, and now recommend:—

1. That after Hilary Term, 1877, candidates for admission as Students-at-Law, (except Graduates of Universities) be required to pass a satisfactory examination in the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti, B. I., vv. 1-300; Virgil, Æneid, B. II., vv. 1-317; Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Canto v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

OF GERMAN.

A paper on Grammar. Mæuseus, Stumme Liebe Schiller, Lied von der Glocke.

2. That after Hilary Term, 1877, candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), be required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or Virgil, Æneid, B. II., vv. 1-317.

Arithmetic.

Euclid, Bb. I., II. and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

3. That a Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk, (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

4. That all examinations of Students-at-Law or Articled Clerks be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, Chairman.

OSGOODE HALL, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.

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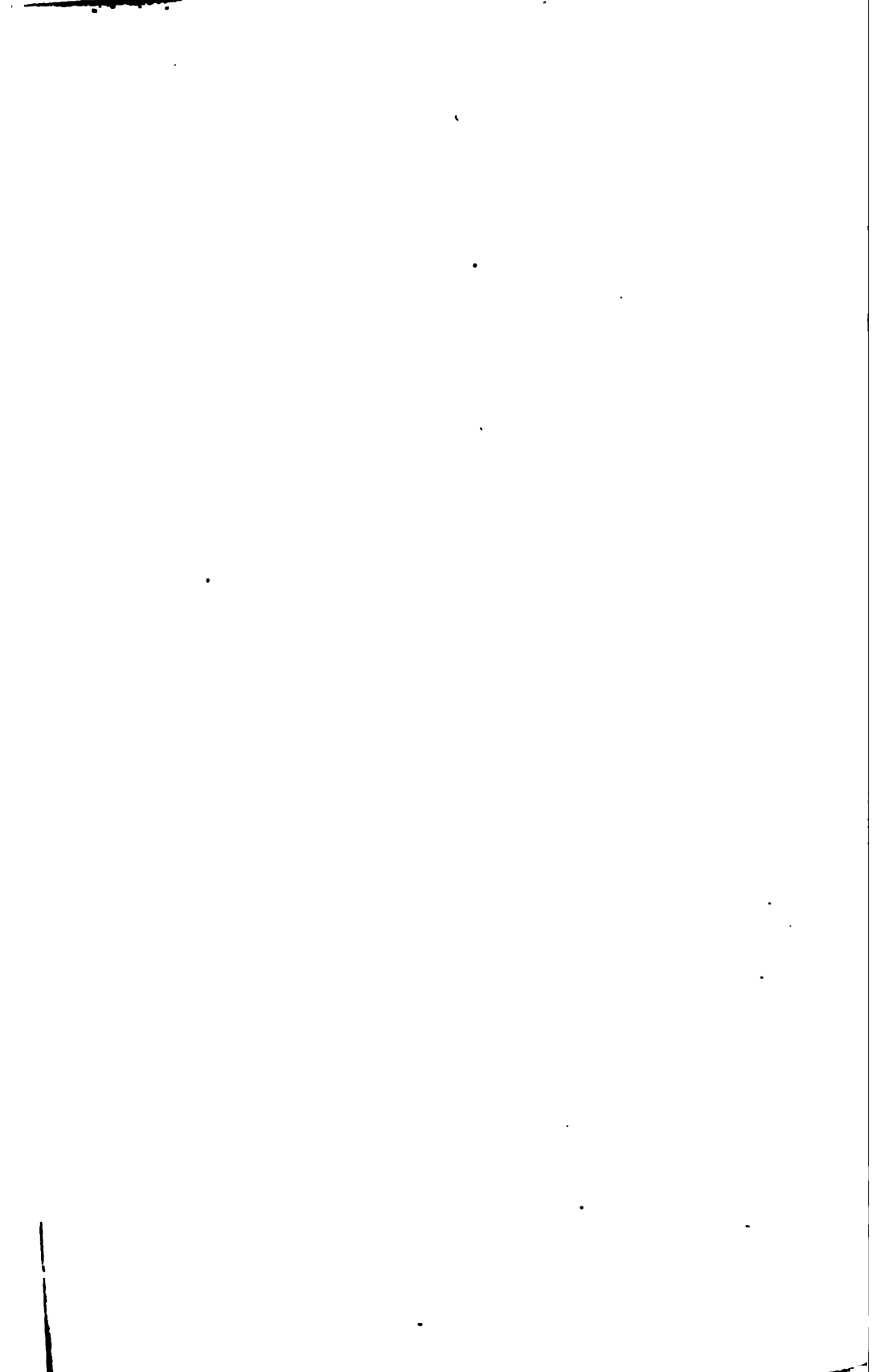
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